

18

Supreme Court of the United States

OCTOBER TERM, 1918.

No. ~~18-1~~

ORIGINAL

IN THE MATTER

OF

The Petition of JAMES THOMSON MUIR, Master of the British
Admiralty Transport *Glenaden*, for a Writ of Prohibition and/or
a Writ of Mandamus

against

The Hon. THOMAS IVESCH, JR., United States District Judge
for the Eastern District of New York, and the other Judges and
officers of the said United States District Court for the Eastern
District of New York.

MOTION AND PETITION FOR A WRIT OF PRO-
HIBITION AND/OR FOR A WRIT OF MANDAMUS

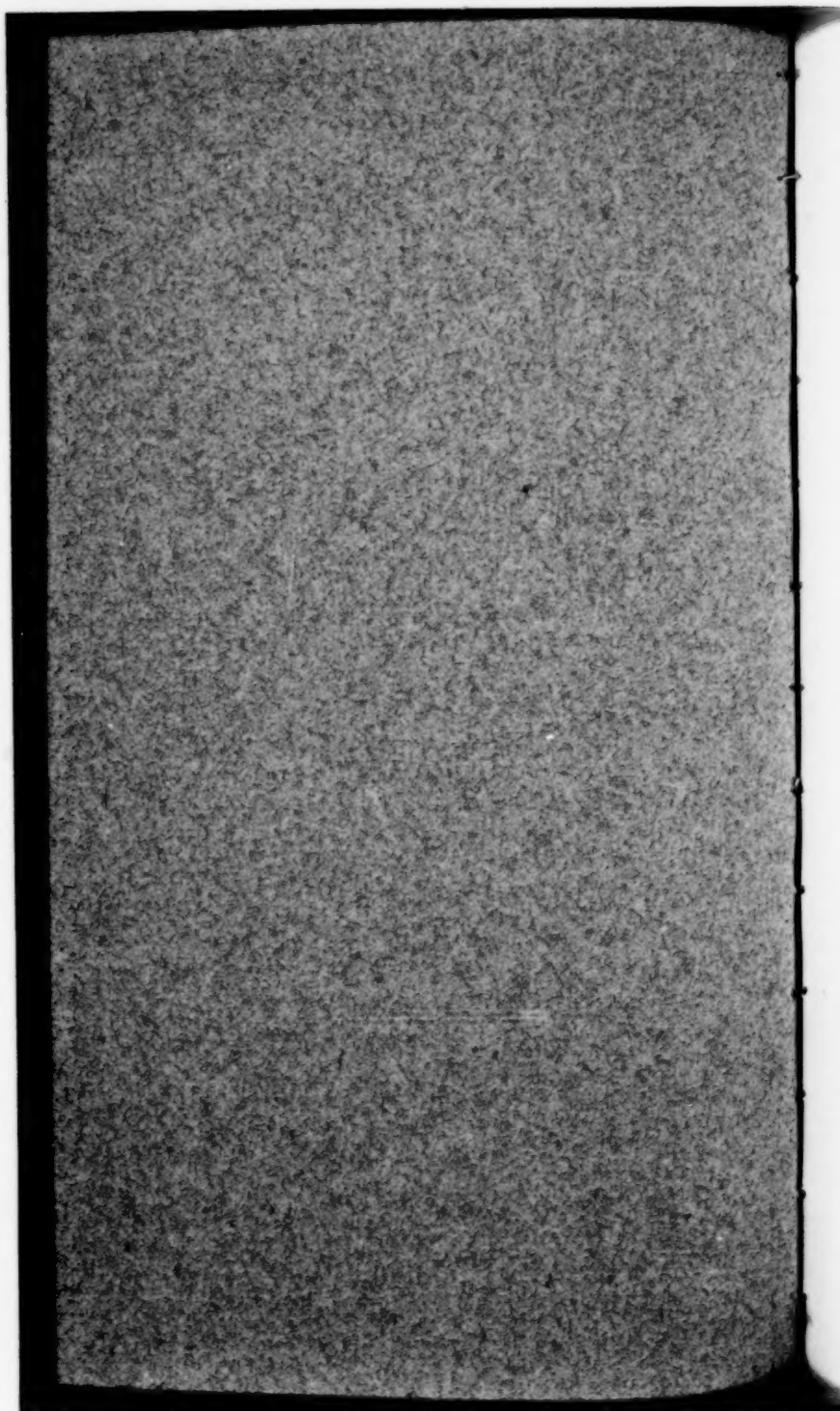
J. PARKER MUIR,

Attorney at Law,

General Office,

100 Broadway,

New York, N. Y.



SUPREME COURT OF THE UNITED STATES. 1

IN THE MATTER

OF

The petition of James Thomson Muir,
Master of the British Admiralty Trans-
port *Gleneden*.

October
Term 1918
No.
Original

MOTION FOR PERMISSION TO FILE PETITION FOR WRIT OF PRO- 2
HIBITION AND/OR FOR A WRIT OF MANDAMUS.

And now comes the petitioner, James Thomson Muir,
master of the British Admiralty Transport *Gleneden*, now
lying at the port of New York, and by John M. Woolsey,
his attorney and counsellor, moves—

1. For leave to file the petition for a writ of prohibi-
tion, and for a writ of mandamus, hereto annexed, and

2. That a rule be entered and issued directing the Dis-
trict Court of the United States for the Eastern District
of New York and Honorable Thomas I. Chatfield, a Judge 3
thereof, and all the other Judges and officers of said Court,
to show cause why a writ of prohibition and/or a writ of
mandamus should not issue against them and each of them
in accordance with the prayer of said petition and why
said petitioner should not have such other and further
relief in the premises as may be just.

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
Counsel for Petitioner.

4 SUPREME COURT OF THE UNITED STATES.

IN THE MATTER

of the

Petition of James Thomson Muir, Master
of the British Admiralty transport
GLENEDEN, for a writ of prohibition
and/or a writ of mandamus against the
Hon. Thomas Ives Chatfield, United
States District Judge for the Eastern
District of New York, and the other
Judges and officers of the said United
States District Court for the Eastern
District of New York.

October
Term 1918.
No.

Original.

5

PETITION FOR WRIT OF PROHIBITION AND/OR
A WRIT OF MANDAMUS.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of James Thomson Muir, master of the British Admiralty Transport "*Gleneden*", against the Honorable Thomas Ives Chatfield, Judge of the United States District Court for the Eastern District of New York, sitting in Admiralty, and all of the other Judges and officers of said United States District Court for the Eastern District of New York, respectfully represents:

6

FIRST: That this petitioner is, and at all the times hereinafter mentioned, was, the master of the British Admiralty Transport "*Gleneden*", now lying in the port of New York, ready to sail, loaded with a cargo of wheat belonging to and consigned to the British Government.

SECOND: That on the 19th of November, 1918, the Società di Navigazione Transatlantica Italiana, as owner of

the Italian Steamship "*Giuseppe Verdi*", filed its libel in the United States District Court for the Eastern District of New York in Admiralty against the British Admiralty Transport "*Gleneden*", claiming damages in the sum of Two Hundred Thousand Dollars (\$200,000), by reason of a collision between the "*Giuseppe Verdi*" and the "*Gleneden*" alleged to have occurred on July 28, 1917, in the Gulf of Lyons, whilst the "*Giuseppe Verdi*" was proceeding from Gibraltar to Genoa, as will more fully appear from a copy of the libel hereto annexed marked Schedule "A" and hereby made a part of this petition. 7

THIRD: That after the filing of the said libel an order for process was issued and the British Admiralty Transport "*Gleneden*" was arrested thereunder on the 19th day of November, 1918. Copies of the order for process and of the process are hereto annexed as Schedules "B" and "C" hereof. 8

FOURTH: That on the 21st day of November, 1918, on the representation to the Court by counsel for the British Embassy, intervening by leave of Court as *amici curiae*, an order to show cause why said writ of arrest against the British Admiralty Transport "*Gleneden*" should not be quashed and dissolved and why all proceedings to arrest or detain said transport under said writ, or otherwise, should not be stayed so long as said transport remains in the service of the British Government, was issued by the Honorable Thomas Ives Chatfield, United States District Judge, on a suggestion filed by Frederic R. Condert, Esq., and Howard Thayer Kingsbury, Esq., counsel for the British Embassy, intervening as *amici curiae* as aforesaid, based on the ground that the steamship was a British Admiralty Transport under orders from the British Admiralty to leave New York on November 25, 1918, to carry a cargo of wheat belonging 9

- 10 to and consigned to the British Government, as will more fully appear from the copies of the order to show cause and the suggestion hereto annexed marked Schedules "D" and "E" and hereby made a part of this petition.

FIFTH: That thereafter, as your petitioner is informed, a number of hearings were had before Judge Chatfield, and an affidavit, verified by your petitioner on the 20th day of November, 1918, a copy of which is hereto annexed marked Schedule "F" and hereby made a part hereof, was submitted for the information of the Court, in addition to the said suggestion.

- 11 Your petitioner is informed and believes that the libelant submitted an affidavit of Joseph A. Barrett, verified November 22, 1918, and a letter written November 19, 1918, by the firm of Kirlin, Woolsey & Hickox to Butler, Wyckoff & Campbell, proctors appearing for the libelant, and a copy of reply thereto of Butler, Wyckoff & Campbell, dated November 20, 1918, were also produced before Judge Chatfield by the proctors for the libelant and filed by said Judge. Copies of this affidavit and these letters are hereto annexed as Schedules "G," "H" and "I" hereof.

- 12 SIXTH: That on the return day of the process, November 27, 1918, Messrs. Kirlin, Woolsey & Hickox, without appearing, requested an adjournment of the process for one week, which request was granted by Judge Edwin L. Garvin, before whom the process was called.

SEVENTH: That thereafter and on the 27th day of November, 1918, the libel was amended by increasing the claim for damages to Four Hundred Thousand Dollars (\$400,000), as will more fully appear from the copies of the Amendment and order amending the libel which are hereto annexed marked Schedules "J" and "K" hereof.

EIGHTH: That thereafter and on the 27th day of November, 1918, the Honorable Thomas Ives Chatfield handed down an opinion in this case in which it was held that the "*Gleneden*" would not be released until a bond had been given by her owners, and an order was made and entered by the said Judge in which, after lengthy recitals of proceedings had, it was provided that it is, 13

"HEREBY ORDERED that the Marshal for this District allow the said steamship *Gleneden* to be removed by the proper representative of the British Government, upon his receipt reciting that said steamship has been received by the British Government from the Marshal of this District as aforesaid, (it being understood that the said steamship is surrendered because of the demand of the British Government to be allowed to control its movements without interference) and upon the giving of a bond by the owner for the claim in litigation or a bond to the Marshal as conditioned on the return of the boat to this District except as the needs of the British Government may keep her elsewhere while under requisition or charter by the British Admiralty." 14

Copies of the opinion and of the order are hereto annexed marked Schedules "L" and "M" hereof.

NINTH: That thereafter and, after the rendering of the opinion aforesaid, on November 29, 1918, an order was entered by Judge Garvin vacating the adjournment of process granted as aforesaid for one week, and it was ordered that the process be made returnable at 3 p. m. on Friday, November 29, 1918, copy of said order is marked Schedule "N" hereof. Thereupon, in order to avoid default and be in a position to protect the rights of everyone interested in the British Admiralty Transport "*Gleneden*", your petitioner intervened specially and filed a special claim and exceptions to the writ, as will 15

- 16 more fully appear from a copy of the said special claim and exceptions which is hereto annexed marked Schedule "O" hereof, and on the filing of that special appearance two weeks were allowed to your petitioner to determine whether he would file a general claim and an answer.

TENTH: That to prevent further delay and expense, the steamship *Glenceden* has been allowed to proceed on her voyage and leave the physical custody of the Marshal of the Eastern District of New York, without the withdrawal or quashing of the writ of arrest and without prejudice to the Court's jurisdiction, by an order which

17 recognized the process of the court as still in force against the vessel, entered on an agreement, which provides for the giving of a stipulation for value in the usual form in the event that this Court shall hold on this writ of prohibition that the process of the said District Court was properly issued and enforced against the steamship *Glenceden*, and that the steamship *Glenceden* is, and was, not immune from the process of the said District Court. A copy of the order permitting the vessel to proceed, and of the agreement referred to, is hereto annexed and marked Schedule "P" hereof.

- 18 ELEVENTH: That true copies of all the papers filed in the United States District Court relevant to this application are hereto annexed.

TWELFTH: That the British Admiralty Transport "*Glenceden*", in pursuance of orders of the British Admiralty, was loaded and ready to sail on the 26th day of November, 1918, but has since been detained by its wrongful arrest under the process of the said United States District Court for the Eastern District of New York in this case as aforesaid.

THIRTEENTH: That, as your petitioner is informed 19
and believes, the British Admiralty Transport "*Glenceden*" is now and at the time of service of said writ was and is, wholly immune from, and is and was not subject to the process of the Court in any form by reason of the facts stated in the suggestion of counsel for the British Embassy.

WHEREFORE, your petitioner prays:

1. That a writ of prohibition may issue against the said Honorable Thomas Ives Chatfield, Judge of the United States District Court for the Eastern District of New York, and/or the other Judges and officers of said Court, prohibiting him and them from proceeding with the said cause and from exacting security as a condition of the release of the "*Glenceden*", or otherwise interfering in any manner with her, on the ground that the British Admiralty Transport "*Glenceden*" is and was immune from process of this Court for the reasons stated in the suggestion of counsel for the British Embassy, and/or 20

2. That a writ of mandamus may issue out of and from this Court against the said Honorable Thomas Ives Chatfield, Judge of the United States District Court for the Eastern District of New York, commanding him to vacate the order made and entered by him on the 27th day of November, 1918, and to enter an order forthwith releasing the British Admiralty Transport "*Glenceden*" without requiring any security as a condition precedent of said release, and staying all proceedings to arrest or detain the said British Admiralty Transport "*Glenceden*" under the said writ, or otherwise, in the said Court, so long as the said British Admiralty Transport "*Glenceden*" remains in the service of the British Government. 21

- 22 3. That the Court grant to the petitioner such other
or further relief as may be just in the premises.

JAMES THOMSON MUIR,
Petitioner.

Sworn to before me, this 10th)
day of December, 1918. }
HARRY D. THIRKIELD,
Notary Public,
(SEAL.) New York County.

23

J. PARKER KIRLEN,
JOHN M. WOOLSEY,
Counsel for Petitioner.

24

Schedule A.

25

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT OF NEW
YORK:

The libel of Società di Navigazione Transatlantica Italiana, owner of the Italian steamship *Giuseppe Verdi*, against the British steamship *Gleneden*, her engines, boilers, tackle, &c., alleges upon information and belief and propounds as follows:

26

FIRST: The libellant above named, is, and at all times hereinafter mentioned was, a corporation duly organized and existing under and pursuant to the laws of the Kingdom of Italy, and is, and at all said times was, the owner of the Italian steamship *Giuseppe Verdi*, which is, and at all said times was, tight, staunch, strong and seaworthy and in every respect properly manned and equipped.

SECOND: The steamer *Gleneden* is a British steamer owned by the Gleneden Steamship Company, Ltd., a corporation duly organized and existing under and pursuant to the laws of the United Kingdom of Great Britain and Ireland and is now or will be during the pendency of process hereunder in the jurisdiction of this honorable Court.

27

THIRD: The said steamer *Giuseppe Verdi* is a steel twin screw steamship of 2757 tons gross register, 505.1 feet long and 59.6 feet wide with a depth of 25.5 feet and was built in the year 1915.

28 FOURTH: At midnight commencing the 28th day of July, 1917, the said steamer *Giuseppe Verdi* was in the Gulf of Lyons proceeding from Gibraltar to Genoa and was at the time fully laden.

The night was dark with a thin mist in the air. There was practically no wind but what little was stirring was from the east. The sea was smooth.

Pursuant to orders received from the naval authorities of Great Britain and Italy the steamer was proceeding at full speed and without any light showing.

29 The chief officer was in command of the watch on the bridge, which consisted, in addition to him, of the second officer and an apprentice or embryo third officer, the quartermaster at the wheel and two lookouts. Another lookout was stationed in the crow's nest forward and two additional lookouts were posted on the forecastlehead.

30 FIFTH: Shortly after one o'clock P. M. under the conditions aforesaid the lookouts reported a dark object, which afterward proved to be the steamer *Gleneden*, a short distance away about three points on the starboard bow of the *Giuseppe Verdi*. Neither at that time nor thereafter were any lights exhibited on the *Gleneden*.

The *Gleneden* appeared to be pursuing a course parallel to that of the *Giuseppe Verdi*, and, whether going in the same direction or in the opposite direction to that of the Italian steamer, seemed to be abundantly clear of the latter.

Suddenly, however, it was noticed that the *Gleneden* was turning rapidly across the course of the *Giuseppe Verdi* from starboard to port. No whistle was blown by the *Gleneden*, however, by reason of which fact it seemed to those aboard the *Giuseppe Verdi* that she was being

overtaken by the *Giuseppe Verdi* and was unaware of 31
 the latter's approach. As the only available means of
 averting a collision, the danger of which was then rec-
 ognized to be imminent, the *Giuseppe Verdi's* helm was
 hard-a-starboarded and her port engine stopped. There-
 after the *Gleneden* blew one short blast indicating that
 she was proceeding on a course opposite to that of the
Giuseppe Verdi and was expecting to pass her port to
 port. There was then nothing that the *Giuseppe Verdi*
 could do to avoid the collision, but to minimize the effect
 thereof and both of her engines were put full speed
 astern. Almost immediately afterward the vessels came 32
 into collision, the port bow of the *Gleneden* immediately
 forward of hold No. 1 striking with great force the
 stem and starboard anchor of the *Giuseppe Verdi* and
 causing serious damage to the Italian steamer.

After the collision the stern of the *Gleneden* swung
 rapidly around to port and her port side and quarter
 came into contact with the starboard side of the *Giuseppe*
Verdi aft of amidships doing further serious damage to
 the latter steamer.

After the vessels had become clear, the *Giuseppe*
Verdi's forepeak was found to be filled with water but 33
 her 'thwartship bulwarks were found to be standing
 intact and no water running aft. She then communi-
 cated with the *Gleneden* by wireless inquiring as to the
 extent of the latter's damage and asking her whether
 she wished assistance. The *Gleneden* replied by wire-
 less asking the *Giuseppe Verdi* to stand by and after-
 ward to escort her toward Port Vendres, which the *Giu-*
seppe Verdi did until two French patrol boats came
 alongside, one of which took the *Gleneden* in charge and

- 34 the other proceeded to escort the *Giuseppe Verdi* on her voyage.

SIXTH: The collision aforesaid was caused solely by the carelessness, negligence and want of care and skill on the part of those in charge of the steamer *Gleneden*, to wit, the servants and agents of the owner of said steamer, and was in no sense nor to any extent caused or contributed to by any carelessness or negligence on the part of those in charge of the steamer *Giuseppe Verdi*.

- 35 The *Gleneden* and those in charge of her were guilty of fault in the following among other respects which the libellant will pray leave to show on the trial of this action:

1. The *Gleneden* was not in charge of competent persons.
2. She had not stationed and was not maintaining a proper or efficient lookout.
3. Although when first seen by those aboard the *Giuseppe Verdi* she was in a position that required her to pass on the starboard side of the *Giuseppe Verdi* and keep clear of her, as she would have had she only maintained her course, the *Gleneden* failed so to maintain her course and to pass starboard to starboard clear of the *Giuseppe Verdi*.
- 36 4. Those aboard the *Gleneden* negligently put her helm to port and ordered her course to starboard so as to bear directly across the course of the *Giuseppe Verdi*.
5. The *Gleneden* failed to indicate in due season by whistle blast the movement of her helm to port although she was aware that by reason of such helm movement she was proceeding across the course of the *Giuseppe Verdi*.
6. Despite her helm movement to port, the result of which was to send her across the course of the

Giuseppe Verdi, the *Gleneden* failed to blow a signal indicating the said helm movement until the vessels were in the act of colliding. 37

7. The *Gleneden*, at the time of moving her helm to port, failed to exhibit her navigation lights to the other steamer although she realized that thereby she was steering a course across that of the *Giuseppe Verdi*.

8. The *Gleneden* failed to slow, stop or reverse her engines in due season or at all or to take other prompt measures to avoid the collision or minimize the effect thereof.

SEVENTH: By reason of the collision aforesaid and the injuries inflicted thereby on the steamer *Giuseppe Verdi* the libellant has sustained damages in the sum of two hundred thousand dollars (\$200,000) and upwards. 38

EIGHTH: The libellant has demanded payment of the said sum from the owner of the *Gleneden* but no part of the said sum has been paid, all of which is now due and owing to the libellant and constitutes a maritime lien on the steamship *Gleneden*.

NINTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable Court. 39

WHEREFORE libellant prays that process in due form of law according to the rules and practice of this honorable Court in cases of admiralty and maritime jurisdiction may issue against the said British steamship *Gleneden*, her engines, tackle, etc., and that all persons claiming any right, title or interest therein may be cited to

40 appear and answer under oath all and singular the matters aforesaid; that this Court will be pleased to decree to the libellant the payment of the damages sustained by it by reason of the said collision as hereinbefore set forth together with interest thereon and the costs of this action; that the said steamship *Glueden* may be condemned and sold to pay the same; and that the libellant may have such other relief as in law and justice it may be entitled to receive.

BUTLER, WYCKOFF & CAMPBELL,

Proctors for Libellant,

Office and Post Office Address,

54 Wall Street,

Manhattan, New York.

41

STATE OF NEW YORK,) ss.:
County of New York,) —

42

DOMINIC A. TRUDA, being duly sworn, deposes and says that he is a member of the firm of McDonnell & Truda, agents in the United States for the libellant herein; that he has read the foregoing libel and is familiar with the contents of the same; that the same is true of his own knowledge except as to those portions therein alleged upon information and belief, which he believes to be true; that the sources of his information and the grounds of his belief are statements made to him by members of the crew of the steamer *Giuseppe Verdi* and other agents of the libellant; and that the reason why this verification is made by deponent and not by libellant is that libellant is a foreign corporation none of whose officers is now within the United States, and your deponent is

duly authorized to make this verification on its behalf 43
and in its stead.

DOMINIC A. TRUDA.

Sworn and subscribed before me this }

19th day of November, 1918. }

[SEAL] JOSEPH A. BARRETT,

Notary Public, Bronx County No. 71, Reg. 970.

New York County No. 481, Reg. 9406.

Kings County No. 122, Reg. 9178.

Commission expires March 30, 1919.

(Endorsed: "Filed November 19, 1918.) 44

Schedule B.

46

At a stated Term of the District Court of the United States of America for the Eastern District of New York held at the United States Court Rooms, in the Borough of Brooklyn, on the 19th day of November in the year of our Lord one thousand nine hundred and eighteen.

Present: The Honorable Thomas L. Chatfield,
District Judge.

47

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, ETC.,

VS.

The Steamship, "GLENEDEN", etc.

48

WHEREAS, a libel hath been this day filed in the office of the Clerk of this Court entitled as above, praying for process from this Court according to due form of law and the practice of this Court:

IT IS NOW ORDERED that upon the filing by the libellant of a stipulation for costs as required by the Rules the action be entered, and that the Clerk issue process in accordance with the prayer of the libel, and the practice of this Court, returnable upon the first return day after seven days from the date hereof, and deliver the same to the Marshal.

By the Court,

PERCY G. B. GILKES, Clerk.

Schedule C.

49

EASTERN DISTRICT OF NEW YORK, ss.

The President of the United States of America to the Marshal of the Eastern District of New York, Greeting: WHEREAS a Libel hath been filed in the District Court of the United States for the Eastern District of New York, on the 19th day of November A. D. 1918, by

SOCIETA DI NAVIGAZIONE TRANSATLANTICA ITALIANA, owner
of the steamship "*Giuseppe Verdi*",

vs.

50

The Steamship "*GLENEDEX*", etc., in a cause of action,
civil & maritime for collision for \$200,000.

(Process amended to read \$400,000.—instead of \$200,000—by order of Court dated Nov. 27/18.

PERCY G. B. GILKES, Clerk.

CORNING G. MCKENNEE,

Deputy Clerk)

for the reasons and causes in the said Libel mentioned, and praying the usual process and Monition of the said court in that behalf to be made, and that all persons interested in the said steamship or vessel, her tackle, &c., may be cited in general and special to answer the premises, and all proceedings being had that the said steamship or vessel, her tackle, &c., for causes in the Libel mentioned, be condemned and sold to pay the demand of the Libellant;

51

- 52 YOU ARE, THEREFORE, HEREBY COMMANDED to attach the said steamship or vessel, her tackle, and to detain the same in your custody, until further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Eastern District of New York, on the 27th day of November, 1918, at 10:30 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the
- 53 next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

WITNESS, the Honorable THOMAS L. CHATFIELD and EDWIN L. GARVIN, Judges of said Court, at the Borough of Brooklyn, in the Eastern District of New York, this 19th day of November A. D. 1918.

- 54 BUTLER, WYCKOFF & CAMPBELL,
Proctors for Libellant.

PERCY G. B. GILKES, Clerk.

In obedience to the within Monition, I attached the S. S. *Gleneden* therein described, on the 19 day of Nov., 1918, and have given due notice to all persons claiming the same, that this Court will, on the 27 day of Nov., 1918, at 10:30 a. m. (if the day shall be a day of jurisdiction, if not on the next day of jurisdiction there-

after) proceed to the trial and condemnation thereof, 55
should no claim be interposed for the same.

JAMES M. POWER,
U. S. Marshal.

Dated Nov. 27, 1918.

(Endorsed in pencil): Nov. 27/18—Ret. adj'd for one
week.

No. 1954—U. S. District Court, Eastern District of New
York—Societa di Navigazione Transatlantica Italiana
vs. Steamship "*Gleneden*", etc.—Process in rem—
Ret'ble the 27th day of November, 1918—Butler, 56
Wyckoff & Campbell, Proctors for Libellant—Filed
November 29, 1918, 3 P. M.

Schedule D.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, owner of the Italian
Steamship "GIUSEPPE VERDI",

against

In Admiralty.

59

British Steamship "GLENEDEN", her
engines, boilers, tackle, etc.

60

It having been represented to this Court by Frederic R. Coudert and Howard Thayer Kingsbury, counsel for the British Embassy in the United States of America, intervening by leave of Court as *amici curiae* that the British Steamship "Gleneden" against which a writ of arrest has been issued in the above entitled cause is an Admiralty transport in the service of the British Government and is under orders from the British Admiralty to sail from the Port of New York on or about November 25th, 1918,

Let the Libellant or its Proctors and the U. S. Marshal show cause before this Court at the United States Post Office Building, in the Borough of Brooklyn, New York, on the 21st day of November, 1918, at 3 P.M. why said writ of arrest against said Steamship "Gleneden" should not be quashed and dissolved and why all proceedings to arrest or detain said Steamship

under said writ or otherwise should not be stayed so long as said Steamship remains in the service of the British Government.

Service of this order upon Libellant's Proctors and on said Marshal on or before November 21st, 1918 at 2 P. M. shall be sufficient.

Dated, November 21st, 1918.

THOMAS L. CHATFIELD,
United States District Judge.

64

Schedule E.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, owner of the Italian
Steamship GIUSEPPE VERDI,

against

In Admiralty.

65

British Steamship GLENEDEN, her
engines, boilers, tackle, etc.

Now come Frederic R. Coudert and Howard Thayer Kingsbury, counsel for the British Embassy in the United States of America and ask leave to intervene in the above entitled cause as *amici curiae*, and as such *amici curiae*, to suggest and represent to this Honorable Court

66

I. That the British Steamship "*Glueden*", against which a writ of arrest has been issued herein should not be seized or detained thereunder, because the said Steamship is an Admiralty transport in the service of the British Government by virtue of a requisition from the Lords Commissioners of the Admiralty, and is engaged in the business of the British Government, and under its exclusive direction and control and is under orders from the British Admiralty to sail from the Port of New York on or about November 25th, 1918, to carry a cargo of

wheat belonging and consigned to the British Government. 67

II. That any interruption or delay of the voyage of said vessel by arrest or other process will interfere with the British Government's possession and control of said vessel, and with the Government business upon which said vessel is engaged, and thereby will interfere with the efficient conduct of the operations incident to the victorious conclusion of the present war.

III. That this Court should not exercise jurisdiction over a vessel in the service of a co-belligerent foreign Government. 68

IV. That the British Courts have refused to exercise jurisdiction over vessels in Government service, whether of the British Government or of allied Governments, in the present war, and that by comity the Courts of the United States should in like manner decline to exercise jurisdiction over vessels in the service of the British Government.

V. That the questions involved in this cause are of great importance to the British Government by reason of the large number of vessels in the service of the British Government which enter ports of the United States, and the important relation borne by the Government service performed by said vessels to the efficient conduct of the operations incident to the victorious conclusion of the war. 69

70 VI. That said writ of arrest against said Steamship "*Gleneden*" should be quashed and dissolved, and that all proceedings to arrest or detain the said Steamship under said writ, or otherwise, should be stayed so long as said Steamship remains in the service of the British Government as aforesaid.

Dated, November 21st, 1918.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for British Embassy
Amici Curiae
No. 2 Rector Street,
New York City,
N. Y.

(Endorsed: "Filed November 21, 1918".)

Schedule F.

73

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, owner of the Italian
Steamship GIUSEPPE VERDI,

against

British Steamship GLENEDEN, her
engines, boilers, tackle, etc.

Affidavit of
James Thom-
son Muir.

74

STATE OF NEW YORK, }
County of New York, } ss.:

JAMES THOMSON MUIR, being duly sworn, says:

I am the master of the steamship *Gleneden* and have been the master thereof since September 24, 1918. The said steamship was then under requisition by the British Government and had been under such requisition, as I am informed, since October 8, 1915.

75

Since prior to the time when I became master of said steamship she has been in the exclusive service of the British Government as an Admiralty transport, classified as such and operated as such solely by the British Admiralty.

On the present voyage of this steamship she proceeded from Swansea, England, to Bordeaux, France, with a cargo of coal consigned to the French Government. From Bordeaux she proceeded to the port of New York in ballast. She is now loading with a cargo of wheat owned by and consigned to the British Government.

76 I receive all my orders in regard to the movements of said steamship from the British Naval Transport Officers and receive none from any other source whatever, and I am not allowed to communicate my arrival and departure from ports to any other person, and no person or corporation is permitted to interfere with the possession and control of said steamship by the British Admiralty.

All the officers of said steamship, including myself, wear an Admiralty Transport Badge upon our caps.

77 The Shipping Articles of said steamship specify that all the officers and crew of said steamship are in the service of the British Admiralty and subject to the orders thereof.

I have been in the Admiralty service ever since the war began, although I have been in command of this steamship only since September 24, 1918, and I receive payments from the Admiralty at regular intervals.

I am under British Admiralty orders to sail as soon as my cargo is completed and it will be completed the first part of next week, on Monday, according to the best information I can secure.

78 Any restraint upon the departure of said steamship will interfere with the Government service upon which I am engaged and the British program for the importation of foodstuffs.

JAMES THOMSON MUIR.

Sworn to before me, this 20th)
day of November, 1918. }

HARRY D. THIRKIELD,

Notary Public, New York County.

Clerk's No. 43, Register's No. 9096.

(SEAL) Certificate filed in Bronx County.

Clerk's No. 5, Register's No. 913.

(Endorsed: "Filed Nov. 21, 1918.")

Schedule G.

79

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA,
Libellant,

against

The British Steamship GLENEDEN, her
engines, boilers, tackle, &c.

80

STATE OF NEW YORK,)
County of New York,) ss.:

JOSEPH A. BARRETT, being duly sworn, deposes and
says:

I am an attorney at law associated with the firm of
Messrs. Butler, Wyckoff & Campbell, proctors for the
libellant herein.

81

As such I have been actively assisting in the institu-
tion of this litigation and the preparation of the case for
trial and am familiar with the steps that have heretofore
been taken herein.

On the 7th day of November, 1918, the Gleneden
Steamship Company, Ltd., owner of the British steam-
ship *Gleneden*, commenced an action in the District
Court of the United States for the District of New Jersey.
The libellant appeared therein by John M. Woolsey, Esq.,
as its proctor of record. A libel was filed wherein it was

82 stated that the libellant sought to recover damages to the extent of \$425,000 for "the cost of repairs, detention, and loss of time, and incidental expenses" resulting from the same collision between the steamers *Giuseppe Verdi* and *Gleneden* as that for the damages growing out of which to the *Giuseppe Verdi* the present action was commenced.

The collision in question occurred on the 28th day of July, 1917.

The first article of the libel filed in the District Court of the United States for the District of New Jersey reads as follows:

83 "The libellant herein is a corporation existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, and at all the times hereinafter mentioned was the owner of the British steamship *Gleneden*, which, at the time of the collision hereinafter mentioned, was tight, staunch, strong and seaworthy, and in every respect, properly manned and equipped."

84 The *Gleneden* Steamship Company therefore is admittedly and at all the times mentioned in said libel, which included the day on which the libel was filed as well as the day of the collision, the sole owner of the steamer *Gleneden*.

In the third article of the libel filed in the District Court of the United States for the District of New Jersey occurs the following paragraph:

"In accordance with orders received by her master from the British Admiralty, and which she was bound to obey, the *Gleneden* was not showing any lights (immediately preceding the collision)."

The absence of lights is thus excused not on the 85
ground that the British Admiralty was in the possession
of the vessel in running her in a manner agreeable to
their own convenience and purpose, but on the ground
that her master had received certain steering regulations
from the British Admiralty which he was bound to obey
and which included among others the absence of lights.

The *Gleneden* libel in article fourth treats of the cause
of the collision as follows:

"The aforesaid collision was caused solely by
carelessness, negligence and want of care and skill 86
on the part of those in charge of the steamship
Giuseppe Verdi, who were servants and agents of
the owner of the said vessel, and in possession
thereof for her owner, and the said collision was
not caused to any extent, or in any manner, by the
carelessness and negligence of those in charge of
the steamship *Gleneden*."

The owner of the *Gleneden* thus undertakes by impli-
cation at least to answer for the conduct of those then in
charge of the steamer *Gleneden* at the time of the col-
lision.

The fifth article of the *Gleneden* libel reads as fol- 87
lows:

"By reason of the aforesaid collision and the
resulting injuries to the *Gleneden*, the libellant has
sustained damages in the sum of four hundred and
twenty-five thousand dollars (\$425,000) and up-
wards, including the cost of repairs, detention and
loss of time, and incidental expenses."

The significant language in the preceding quotation
has been underlined by the writer in order that it might
the more clearly appear that the *Gleneden* owner there-

88 by claims to have been obliged to make at its own expense the necessary repairs to the *Gleneden* following the collision, and to suffer all the loss resulting from her inability to earn money during the period of said repairs, together with all incidental expenses.

89 It is inconceivable that this loss should have been sustained by the owner of the *Gleneden* if the requisition charter-party alleged to have existed between the British Government and the owner was anything more than the usual time charter-party. If it had constituted a demise of the steamer to the British Sovereign it goes without saying that the repairs would have had to be made by and at the expense of the Crown, charter hire paid by the Crown during the period of repairs and all incidental expenses borne and paid by the Crown. The affidavit of James Thomson Muir, master of the *Gleneden* shows too that the ship was under requisition at the time of the said collision and does not contend that the character of requisition in force at that time was any different from that now in force.

For the further enlightenment of the Court a complete copy of the *Gleneden* libel is herewith attached.

JOSEPH A. BARRETT.

90 Sworn to before me this 22nd)
day of November, 1918. }

CHAS. PLYM,

Notary Public, Bronx County, No. 12.

Certificate filed in New York County, No. 140.

(SEAL) Bronx County Register's No. 225.

New York County Register's No. 10130.

Commission expires March 30, 1920.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY. 91

The libel of the Gleneden Steamship Company, Ltd., owner of the British Steamship *Gleneden*, against the Italian Steamship *Giuseppe Verdi*, her engines, boilers, tackle, etc., alleges, on information and belief, as follows:

FIRST: The libelant herein is a corporation existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, and at all the times hereinafter mentioned was the owner of the British steamship *Gleneden*, which, at the time of the collision hereinafter mentioned, was tight, staunch, strong and seaworthy, and in every respect, properly manned and equipped. 92

SECOND: The steamship *Giuseppe Verdi* is a private Italian merchant steamer owned by Societa di Navigazione "Transatlantica Italiana" of Genoa, Italy, a corporation organized and existing under the Laws of the Kingdom of Italy, and is now, or will be during the pendency of process hereunder, within this District and the jurisdiction of this Honorable Court, in possession of her said owner or its servants and agents. 93

THIRD: On or about July 27, 1917, the steamship *Gleneden* left Marseilles, France, bound for the United States via Port Vendres and Gibraltar. She is a steel screw steamship, of about 4,735 tons gross register, 400 feet long and 52 feet wide. On the voyage in question she was in ballast.

The voyage proceeded without incident until about 1 o'clock A. M. on July 28, 1917, when the *Gleneden* was in the Gulf of Lyons, in approximately Lat. 42° 49' N.

94 and Long. $4^{\circ} 14' E$. The night was dark, but clear, with a light wind from the south and a smooth sea.

In accordance with orders received by her master from the British Admiralty, and which she was bound to obey, the *Gleneden* was not showing any lights.

The second officer was on the bridge with a quarter-master at the wheel, and with a proper lookout stationed forward. The vessel was proceeding full speed ahead.

95 Shortly before 1:10 o'clock A. M., the conditions remaining unchanged, a dark object, which afterwards proved to be the *Giuseppe Verdi*, was sighted ahead, about $1\frac{1}{2}$ points on the port bow of the *Gleneden*. The *Giuseppe Verdi* was not showing any lights.

The second officer of the *Gleneden* at once blew a signal of one blast, to indicate a port passage, and put the helm hard over to port.

96 The *Giuseppe Verdi* did not answer this signal or blow any other signal, but at first appeared to be shaping her course to pass safely to port, until the vessels were close to each other, when she was seen to change her course suddenly to port so as to head directly for the *Gleneden*. There was then nothing that the *Gleneden* could do to avoid the collision, and the bow of the *Giuseppe Verdi* struck the *Gleneden* with great force on the port side forward of the middle of Number 1 hold, causing serious damage.

After the collision, the *Giuseppe Verdi* swung along the port side of the *Gleneden*, damaging the latter's port life boat, and the shell plating on the port quarter. The *Gleneden* was found to be leaking badly as a result of the collision, but she was finally able to make Port Vendres in safety.

FOURTH: The aforesaid collision was caused solely 97
by carelessness, negligence and want of care and skill on
the part of those in charge of the steamship *Giuseppe*
Verdi, who were servants and agents of the owner of the
said vessel, and in possession thereof for her owner, and
the said collision was not caused to any extent, or in any
manner, by the carelessness and negligence of those in
charge of the steamship *Gleneden*.

The faults of the *Giuseppe Verdi* were, among others,
which will be shown at the trial hereof, the following:

1. The *Giuseppe Verdi* was not in charge of compe- 98
tent persons.

2. She was not keeping a proper and efficient lookout.

3. Being in a situation which required her to pass on
the port side of the *Gleneden* and keep clear of her, the
Giuseppe Verdi failed to shape her course so to pass.

4. She negligently put her helm to starboard and al-
tered her course to port so as to bear directly on the
course of the *Gleneden*.

5. She failed to acknowledge the signal of one blast
for the *Gleneden*, and to shape her course accordingly. 99

6. She failed to blow any signals on sighting the
Gleneden.

7. She failed to slow, stop, and/or reverse her en-
gines seasonably, or to take other prompt measures to
avoid the collision or lessen the resulting damages.

FIFTH: By reason of the aforesaid collision and the
resulting injuries to the *Gleneden*, the libellant has sus-
tained damages in the sum of four hundred and twenty-

100 five thousand dollars (\$425,000) and upwards, including the cost of repairs, detention and loss of time, and incidental expenses.

SIXTH: The libelant has demanded payment of the said sum from the owner of the *Giuseppe Verdi*, but payment has at all times been refused, and the said sum is now due and owing to the libelant and constitutes a maritime lien upon the said *Giuseppe Verdi*.

101 SEVENTH: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of this Honorable Court.

WHEREFORE, Libelant prays that process in due form of law, according to the rules and practice of this Honorable Court, in cases of Admiralty and Maritime jurisdiction, may issue against the said Italian steamship *Giuseppe Verdi*, her engines, boilers, tackle, etc., and that all persons claiming any right, title or interest therein may be cited to appear and answer under oath all and singular the matters aforesaid; that this Court will be pleased to decree to the libelant the payment of the damages caused
102 by the said collision as hereinabove set forth, with interest thereon and with the costs of these proceedings; that the said steamship may be condemned and sold to pay the same, and that the libelant may have such other relief as in law and justice it may be entitled to receive.

JOHN M. WOOLSEY,
Proctor for Libelant.

STATE OF NEW YORK,) ss. :
County of New York,)

103

JOHN M. WOOLSEY, being duly sworn, says:

I am the proctor for the libelant herein.

The foregoing libel is true of my own knowledge, except as to those matters therein alleged on information and belief, and as to the same I believe it to be true.

The sources of my information and the grounds of my belief as to those matters not within my own knowledge are statements made by officers and members of the crew of the *Gleneden*, and by agents of the libelant.

104

The reason this verification is not made by the libelant is that it is a foreign corporation, and the reason it is not made by one of its officers is that none of its officers is now within this country.

JOHN M. WOOLSEY.

Sworn to before me, this 7th)
day of November, 1918. }

WM. O. GODDARD,

Notary Public, Kings County.

Certificate filed in New York County.

105

Schedule H.

NOVEMBER 19, 1918.

MESSRS. BUTLER, WYCKOFF & CAMPBELL,
 54 Wall Street,
 New York, N. Y.
Giuseppe Verdi—Glenceden Collision

DEAR SIR:

You advised us this morning that you purposed filing a libel against the *Glenceden*.

107 We are writing you this letter to tell you that we have been advised that the steamship is a British Admiralty Transport and as such is not subject to the process of the court.

If you take any proceeding against the vessel we shall have to make a motion to have the process set aside, and in that we will have the cooperation of counsel for the British Embassy.

We suggest, therefore, that the best course to pursue is the course which we mentioned to you this morning, namely, for you to file a cross libel in the New Jersey court, and to advise us of the precise amount of security you desire, when we will cable our clients and see whether it can be obtained.

Very truly yours,

JMW:W

KIRLIN, WOOLSEY & HICKOX.

9155

(Endorsed: "Filed November 27, 1918.

By order of CHATFIELD, J.")

Schedule I.

109

BUTLER, WYCKOFF & CAMPBELL
54 Wall Street

NEW YORK, NOVEMBER 20, 1918

GIUSEPPE VERDI—GLENEDEN

MESSRS. KIRLIN, WOOLSEY & HICKOX,
27 William Street,
New York City.

110

DEAR SIR:

Your letter of the 19th inst. came to hand yesterday afternoon, after the *Gleneden* had been arrested. It could have made no difference if it had arrived earlier in view of the fact that private steamers requisitioned by the British Admiralty are not immune from the process of our admiralty courts any more than are the steamers requisitioned by the Italian Government, such as the *Giuseppe Verdi*, or the steamers requisitioned by the United States Shipping Board.

Your suggestion that a cross-libel be filed in the District Court of New Jersey could not have been acted upon for the reason that we desire not the stay of the action commenced by Mr. Woolsey in that Court, but affirmative relief against the *Gleneden*, of which we could be assured only by taking the course actually pursued.

111

We called up your Mr. Woolsey in advance of filing the libel and informed him of our intention to do so only because Mr. Woolsey had appeared as the proctor of record for the *Gleneden* in the action filed on behalf of her owners against the *Giuseppe Verdi* in the District

112 Court of New Jersey. We thought that he might also be retained to act as the attorney for the same owners in this action and we desired that he have opportunity to cable to the owners at as early a moment as possible with respect to the amount of the bond we would require. We accordingly informed him at the time of the amount of the bond that we would require as stated in the libel.

In view of your letter we now take it for granted that you are acting for the *Gleneden* owners.

Very truly yours,

(sgd) BUTLER, WYCKOFF & CAMPBELL

113

(Filed November 27th, 1918. By order of

CHATFIELD, J.)

114

Schedule J.

115

TO THE HONORABLE THE JUDGES OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW
YORK:

This amendment to the libel of Societa di Navigazione Transatlantica Italiana, owner of the Italian steamship *Guiseppe Verdi* against the steamship *Gleneden*, her engines, boilers, tackle, etc., alleges upon information and belief, and pro-
pounds as follows:

FIRST: The libelant here repeats the allegations of 112
its original libel verified November 19, 1918, and filed in this court November 19, 1918, except as hereinafter modified.

SECOND: The libelant avers that by reason of the collision as set forth in the allegations of the original libel and the injuries inflicted thereby on the steamship *Guiseppe Verdi*, the libelant has sustained damages in the sum of \$400,000 and upwards instead of \$200,000, as alleged in the original libel.

WHEREFORE, libelant prays for a decree in the sum 117
of \$400,000 and interest, and a condemnation and sale of the steamship *Gleneden* to satisfy the same, and for all other relief prayed for in the original libel and for such other and further relief as in law and justice it may be entitled to receive.

BUTLER, WYCKOFF & CAMPBELL,

Proctors for Libelant,

Office and P. O. Address,

54 Wall Street,

Borough of Manhattan,

City of New York.

118 STATE OF NEW YORK,)
County of New York, { ss.:

ALEXANDER J. McDONNELL, being duly sworn, deposes and says:

119 That he is the duly authorized agent of the firm of McDonnell and Truda, agents in the United States for the libelant herein; that he has read the foregoing amendment to the libel and is familiar with the contents of the same; that the same is true of his own knowledge except as to those portions therein alleged upon information and belief, which he believes to be true; that the sources of his information and the grounds for his belief are statements made to him by members of the crew of the steamship *Guisepe Verdi* and other agents of the libelant; and that the reason why this verification is made by deponent and not by the libelant is that the libelant is a foreign corporation none of whose officers is now within the United States; that none of the firm of McDonnell and Truda are within the United States and your deponent is duly authorized to make this verification on its behalf and in its stead.

ALEXANDER J. McDONNELL.

120 Sworn to before me this 27th)
day of November, 1918. }

JOSEPH A. BARRETT,

Notary Public, Bronx County No. 71, Reg. 970.

New York County No. 481, Reg. 9406.

Kings County No. 122, Reg. 9178.

Commission expires March 30, 1919.

(Endorsed: Filed November 27, 1918.)

Schedule K.

121

At a Stated Term of the District Court of the United States for the Eastern District of New York, held in the Court Rooms thereof in the Post Office Building, Borough of Brooklyn, City and State of New York, on the 27th day of November, 1918.

Present—HONORABLE THOMAS I. CHATFIELD,

District Judge.

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, owner of the Italian
Steamship GIUSEPPE VERDI,

against

British Steamship GLENEDEN, her
engines, boilers, tackle, etc.

122

Upon the annexed affidavit of Homer L. Loomis, verified the 27th day of November, 1918, and on motion of Butler, Wyckoff & Campbell, proctors for the libellant, it is

123

ORDERED that article seventh of the libel herein be amended by substituting for the words and figures "two hundred thousand dollars (\$200,000)" the words and figures "four hundred thousand dollars (\$400,000)"; that an amended libel in accordance therewith may be filed and that the process of the Court issued herein be amended accordingly.

(Signed) THOMAS I. CHATFIELD,

U. S. D. J.

(Filed and entered November 27, 1918)

124 DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF NEW YORK.

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, owner of the Italian
Steamship GIUSEPPE VERDI,

against

The British Steamship GLENEDEN, her
engines, boilers, tackle, etc.

125

STATE OF NEW YORK,) ss.:
County of New York, }

HOMER L. LOOMIS, being duly sworn, deposes and says that he is a member of the firm of Butler, Wyckoff & Campbell, proctors for the libelant in the above entitled action; that since the filing of the libel in said action he has received information to the effect that the damages sustained by the libelant are at least of the amount of \$400,000, instead of \$200,000, the figure mentioned in the libel now on file herein; that no claim has been filed or appearance entered in said action on behalf of any claimant and libelant therefore asks that the libel be amended, increasing the damages claimed from the sum of \$200,000 and upwards to the sum of \$400,000 and upwards.

126

(Sgd) HOMER L. LOOMIS.

Subscribed and sworn to before me

this 27th day of November, 1918. }

JOSEPH A. BARRETT,

Notary Public, Bronx County No. 71, Reg. 970.

(SEAL) New York County No. 481, Reg. 9406.

Kings County No. 122, Reg. 9178.

Commission expires March 30, 1919.

Schedule L.

127

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA

against

British Steamship GLENEDEN, her
engines, boilers, tackle, etc.

128

BUTLER, WYCKOFF & CAMPBELL, proctors for libellant,
FREDERIC R. COUDERT and HOWARD THAYER KINGSBURY,
counsel for the British Embassy, *amici curiae*,
KIRLIN, WOOLSEY & HICKOX (by Mr. Potter), present by
direction of the Court.

CHATFIELD, J.

The owner of the steamship *Giuseppe Verdi* has
caused the steamship *Gleneden* to be taken into posses- 129
sion of the Marshal on a claim of damages for collision.
As yet there has been no appearance by owner or claim-
ant but the admitted owner has been brought into court
through its proctors.

It also appears that the owner of the *Gleneden* has
filed, in another District, a similar action against the
Giuseppe Verdi for damages growing out of the same
collision. In the meantime and in this court the British
Government, through its Ambassador, has appeared by
counsel and has filed a suggestion, that the *Gleneden* is

130 now a public vessel of the British Empire and asked her release. Objection has been made that such an appearance cannot be received and that a suggestion thus made is not properly before the court.

131 In the case of *The Anne*, 16 U. S. at p. 445, the Supreme Court held that a Consular Agent, clothed with authority only for commercial purposes, could not appear in a private litigation by attorney and thereby bring in the sovereign as a party to the action. This case was followed in *The Luigi*, 230 Fed. 493, where apparently the proctor for a private party came into court and merely called the court's attention to the fact that the Italian Government was the real party in interest. The court said that a suggestion of that sort should be made through the proper agents to certify diplomatic matters. But in *The Luigi*, the U. S. Attorney, by the direction of the Attorney General, also appeared in court and, apparently through what was considered proper channels, made the same suggestion and the case was disposed of because the private owners had already intervened and furnished a bond, and the interests of the Italian Government were not called into question, the vessel having been released.

132 In *The Attualita*, 238 Fed. 909, the Circuit Court of Appeals of the Fourth Circuit reverses Judge Waddill, and announces the same proposition that a nation cannot appear and interfere with the litigation of a matter that is properly before the court, unless the appearance is presented in some such way, or based on such a showing of fact that the court must take notice of it. The decision really remanded the case for further hearing, Judge Waddill having released the ship merely upon a suggestion by counsel and by the Attorney General, that

a diplomatic question was involved. The Circuit Court of Appeals held that the facts set forth did not show that a public vessel of the foreign government would be interfered with. 133

Counsel have also called to my attention the decision of Judge Learned Hand, in the Matter of the *Florence H.*, 248 Fed. 1013. This holds that it would not be proper to subject the claims of a foreign government to contentious litigation, but that if the claim of the foreign government is properly presented, through the proper diplomatic channel, it is of course supreme. I see nothing else in that decision that affects the question we have here, except that the vessel is liable for a cause of action arising from the acts of those in charge of her movements. 134

Now in the case at bar the suggestion is not made by a consul nor by the District Attorney acting without a definite statement as to the claim of the Government, that is the foreign Government, but the suggestion is filed by the person of the British sovereign himself, inasmuch as the Ambassador comes into court, appearing by counsel (there being no question that the counsel has the right to appear) and demands the possession of the vessel. Insofar as the rights of the British Government are concerned, I see no way of litigating that question, nor should the demands of the British Government be denied so far as its demands are not in dispute. The real question at interest is between the libellant and the private owner, if the right of the British Government to control, navigate and direct the movements of the vessel do not go so far as to make the Government liable for damages inflicted by or to the vessel. (*The Florence H.*, *supra*). 135

If the owners of the vessel have private claims either

136 against the boat which has come in collision or against the British Government, the only way to protect those claims would be to release the vessel by bond, and to that extent the process of the Marshal is to some avail. The boat is a public vessel of the British Government only in the sense that her use by that Government should not be unduly interfered with. As was held in *The Attualita*,
 137 *supra*, the boat is not immune from liability as a war vessel would be. The British Government by its suggestion does not claim that it owns the vessel or that it is responsible for it as an owner, either for the damage inflicted or as the beneficiary of damages that might be recovered, and therefore the vessel is properly in custody and process could be executed.

The owner of the vessel has knowledge of that, and being brought into court in order that the situation may be considered with his rights so presented that they can be protected by him, I think that the question of defending the merits of the action is presented as between the libellant and the owner of the vessel. If the owner of the vessel abandons his boat to the British Government, this Court will feel that it may surrender possession of the boat to that Government on proper safeguards, and
 138 the libellant in this case will be entitled to urge whatever estoppel may result from the facts against the owner and claimant of the boat wherever the vessel may again be taken into custody, or whenever she shall be surrendered by the British Government.

My conclusion therefore is that, unless the claimant appears in the action and gives security to take the place of the vessel, between now and the time when the vessel should sail under the order of the British Government, a decree may be entered reciting the notice to the owner and the demand upon him, reciting the appearance of the

British Government, and decreeing that as no claim by the owner has been presented to the court, the court can act on that default. But the Court will not retain possession of the boat unless that possession can be acquired without interfering with the rights of the British Government. 139

If the owner of the vessel wishes to bring the matter into the situation presented either in the case of *The Luigi* or *The Attualita*, then I am prepared to hold that the suggestion filed by the British Government would require nothing to be done except to release the vessel under bond. But unless the owner wishes to protect his ownership by such an appearance, within the time when he may appear and answer, I can do nothing further with the boat at present than to release her upon the demand of the British Government, upon providing for her restoration to the custody of the Marshal, or to restore to the custody of the Marshal the proceeds of the vessel after the British Government has ceased its exercise of sovereign rights. 140

The case of *The Roseric* (D. C. N. J.) decided about November 21, 1918, goes at length into the law and decisions in general and bears out the conclusions of this Court herein. The exercise of jurisdiction over an Italian vessel controlled by the orders of the British Government, with respect to a collision occurring in the Mediterranean is a matter of judicial discretion, and the needs of a co-belligerent must appeal to the Court in the present condition of the war and its consequences, but the *Glenneden* is not a public vessel in the sense in which that term was used in *The Exchange*, 11 U. S. 116, and in the various other cases cited in *The Roseric, supra*. The rights of the British Government are such that diplomatic representations might have been made to the 141

- 142 United States Government, to secure for the British Government the use of the vessel during the period that she is requisitioned, or to arrange that her service should not be interrupted by unnecessary delays. If, on the other hand, the *Glenceden* was a public vessel in the broad sense of that word, the Marshal would not have been allowed on board with his process, or the United States Government would agree that the vessel could sail without reference to the process. The Court held upon the first presentation of the argument that the rights of the British Government to use this boat as a requisitioned vessel should be respected, but matters arising upon the various arguments had and consideration of the record as well as the conditions reported with respect to the process to the Court, by the U. S. Marshal, satisfy the Court that, as stated in the letter of Kirlin, Woolsey & Hickox, the owners of the vessel have presented this question to the Court through the acquiescence and co-operation of the counsel for the British Embassy. The owners of the vessel are in a position to secure the return of the boat to this court and notice has been given them to that effect. On the other hand, the British Government could undertake to return the vessel at the owners' expense and to this the owners might agree, or to secure the claim if this cannot be done.
- 144

The Court, therefore, will modify the opinion expressed when notice was first given to the owners and will hold that the boat may be released to the British Government by the Marshal, for the purpose of being used as a public vessel only upon the giving of a bond by the claimant or a bond or undertaking to the Marshal to return the vessel or secure the claim, and pending that the vessel will be held until further order.

THOMAS L. CHATFIELD,

U. S. D. J.

Nov. 27, 1918.

Schedule M.

145

At a Stated Term of the District Court of the United States of America for the Eastern District of New York, held at the United States Court Rooms, in the Borough of Brooklyn, City of New York, on the 27th day of November, 1918.

Present:—THE HONORABLE THOMAS L. CHATFIELD,
District Judge.

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, OWNER of the Italian
Steamship GISELLE VERDI,
Libellant,

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against

British Steamship GLENEDEX, her
engines, boilers, tackle, etc.

The libellant above named having filed its libel in rem against the above named British steamship *Gleneden* and a writ of arrest having been issued against said steamship and served by the Marshal of this District, and Frederic R. Coudert, Esq. and Howard Thayer Kingsbury, Esq., counsel for the British Embassy in the United States of America, having intervened by leave of court as *amici curiæ*, and representing that the said steamship is a public vessel that is an admiralty transport in the service of the British government and is under orders from the British Admiralty to sail from the port of New York on or about November 25, 1918, and demanding that

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- 148 the vessel be allowed to proceed, and proctors for libellant having represented to the court that the Gleneden Steamship Company, Limited, a British corporation, is the owner of said steamship, that said steamship is requisitioned by the British Admiralty from said corporation for present uses only and that a libel has been filed in rem in the District Court of the United States for the District of New Jersey against the steamship *Giuseppe Verdi* above named, in which the said corporation claims the right of owner to said vessel; and the court having thereupon directed that the proctors for the libellant in
- 149 said suit in said District of New Jersey be notified and directed to attend; now upon the suggestion in writing of said *amici curiae*, dated November 21, 1918, and the affidavit of James Thomson Muir, the master of said steamship, verified November 20, 1918, having been presented for the information of the court, and the affidavit of Joseph A. Barrett, verified November 7th, 1918, and the letter of Kirlin, Woolsey & Hickox, proctors for the owners of the *Gleneden*, dated November 19, 1918, having been filed, and the matter coming on on November 22, 1918, to be heard upon the return of an order to show
- 150 cause dated November 21, 1918, directed to libellant's proctors and to the Marshal of this District, and after hearing Frederic R. Conder, Esq., and Howard Thayer Kingsbury, Esq., counsel for the British Embassy in the United States of America, intervening as *amici curiae*, as aforesaid, in support of the suggestion and presenting the claim of the British Admiralty that the said steamship should be allowed to sail under its orders on November 25, 1918, and Homer L. Loomis, Esq., counsel for the libellant, in opposition thereto, and the U. S. Attorney appearing for the Marshal, and Messrs. Kirlin, Woolsey

& Hickox, proctors for the libellant in said suit in the District of New Jersey being present, by Mr. Potter by order of court, and the court having adjourned the matter until November 25th, 1918, at 10 A.M. and having directed the proctors for the owners to appear and to give bond as claimant for said vessel by said November 25th, unless the owners intended to abandon their claim thereto and allow the vessel to be sold for the libellant's benefit, in default of appearance by claimant within the time in which claimant could appear and give bond for the vessel's release, and the said proctors having stated that they would not at this time appear or give bond and would make no claim on behalf of the owners nor appear personally therefor, and no bond having been furnished by the Gleneden Steamship Company, Limited, for the release of said steamship; it is

HENRY ordered that the Marshal for this District allow the said steamship *Gleneden* to be removed by the proper representative of the British Government, upon his receipt reciting that said steamship has been received by the British Government from the Marshal of this District as aforesaid, (it being understood that the said steamship is surrendered because of the demand of the British government to be allowed to control its movements without interference) and upon the giving of a bond by the owner for the claim in litigation or a bond to the Marshal as conditioned on the return of the vessel to this District except as the needs of the British Government may keep her elsewhere while under requisition or charter by the British Admiralty.

THOMAS I. CHATFIELD,
U. S. D. J.

(Endorsed: "Filed November 27, 1918.")

Schedule M.

154

At a Stated Term of the District Court of the United States for the Eastern District of New York, held at the Court Rooms in the Post Office Building, Borough of Brooklyn, City of New York, on the 29th day of November, 1918.

Present—HONORABLE EDWIN L. GARVIN,
U. S. D. J.

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SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, owner of the Italian
Steamship GIUSEPPE VERDI,

Libellant,

against

British Steamship GLENEDEN, her
engines, boilers, tackle, etc.

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The Marshal having returned on the process issued in the above entitled cause that he has attached the said vessel, her tackle, apparel and furniture, and has given due notice to all persons claiming the same, that this Court would on November 27, 1918, proceed to the trial and condemnation of the said vessel, her tackle, etc., should no claim be interposed for the same; and proclamation having been made for all persons interested in the said vessel, her tackle, etc., to appear and interpose their claims, and no person appearing and the return day having been by inadvertence adjourned for one week;

Now, on motion of Butler, Wyckoff & Campbell, 157
proctors for the libelant, it is

ORDERED, that the said adjournment of the return day
be vacated, set aside and declared of no effect; and it is
further

ORDERED, that the Clerk of this Court remove from the
Clerk's minutes and all other records the entry of said
adjournment, and it is further

ORDERED, that the return be made at 3 p. m. on the
29th day of November, 1918, before me.

EDWIN L. GARVIN,

U. S. D. J.

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(Endorsed, Filed November 29, 1918.)

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Schedule O.

160

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT OF NEW YORK.

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, owner of the Italian
Steamship GIUSEPPE VERDI,

against

Special Claim
and Exceptions
to the Writ

161

British Steamship GLENEDEN, her
engines, boilers, tackle, &c.

162

And now comes JAMES THOMSON MUIR, intervening specially, as master of the steamship *Gleneden*, for the interest of the Gleneden Steamship Company, Limited, in the said steamship *Gleneden*, etc., as the same are attached by the Marshal under process of this Court at the instance of Societa di Navigazione Transatlantica Italiana, owner of the Italian steamship *Giuseppe Verdi*, for the purpose of objecting to the arrest, seizure and detention of the said steamship *Gleneden* under a writ of arrest which has been issued herein because the said steamship *Gleneden* is an Admiralty transport in the service of the British Government by virtue of a requisition from the Lords Commissioner of the Admiralty and is engaged in the business of the British Government and under its exclusive direction and control and is under orders from the British Admiralty to sail from the port of New York at once to carry a cargo of wheat now on board belonging to and consigned to the British Government, and the

said James Thomson Muir avers that he was the master of the said steamship *Gleneden*, etc., at the time of the attachment thereof and that the Gleneden Steamship Company, Limited, is the true and *bona fide* owner of the said steamship and that no other person is the owner thereof, and that as master he is the true and lawful bailee of the said steamship, wherefore he prays to be admitted to file his claim solely for the purposes hereinabove mentioned. 163

AND FOR EXCEPTIONS to the jurisdiction of this Court by the said writ of arrest the master respectfully avers that at the time when the process was served upon the said steamship *Gleneden* she was, and is now, an Admiralty transport in the service of the British Government by virtue of a requisition from the Lords Commissioner of the Admiralty and is engaged in the business of the British Government and under its exclusive direction and control and is under orders from the British Admiralty to sail from the port of New York at once to carry a cargo of wheat belonging to and consigned to the British Government, which cargo she now has on board, and that she was not at the time of the process, nor is she now, engaged in any other business whatsoever. 164 165

WHEREFORE this claimant and exceptant appearing specially as above stated alleges that the steamship *Gleneden* is immune from arrest under process of this Court for the reasons hereinabove stated, and prays that the Court will quash the said writ and the process issued

166 thereunder and release the steamship *Glenceden* at once from the arrest and from the custody of the Marshal.

JAS. T. MUIR,

Master appearing specially for the purposes above named.

Subscribed to before me this/
26th day of November, 1918.)

WM. O. GODDARD,

Notary Public, Kings County.

Certificate filed in New York County.

(SEAL)

KIRLIN, WOOLSEY & HICKOX,

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Proctors appearing specially for the purposes of objecting to the arrest of the steamship *Glenceden* as above stated and for no other purpose.

(Endorsed: "Filed November 29, 1918")

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Schedule P.

169

At a Stated Term of the District Court of the United States, for the Eastern District of New York, held at the United States Court Rooms, in the Borough of Brooklyn, City of New York, on the 10th day of December, 1918.

Present—HON. THOMAS L. CHATFIELD,
District Judge.

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SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, owner of the Italian
Steamship "GIUSEPPE VERDI,"

against

British Steamship *GLENEDEN*, her
engines, boilers, tackle, etc.

171

On the annexed agreement for security, and consent of the proctors for the libellant herein, and the record herein, it is

ORDERED that in order to prevent further delay and expense, the steamship *Glenceden* be and she hereby is allowed to proceed on her voyage and leave the physical custody of the Marshal of the Eastern District of New York, provided, however, that this order does not and shall not be deemed to constitute any withdrawal or quashing of the writ of arrest; and it is

172 FURTHER ORDERED that all proceedings herein be stayed and special claimant's or libellant's time to file any other or further papers herein be extended to and including the 23rd day of December, 1918, and in case application is made for a writ of prohibition to the Supreme Court on or before December 23rd, 1918, all proceedings herein be stayed and the time of the special claimant or of the libellant to file any other or further papers herein be extended until ten (10) days after the entry and service of an order or decree on the final decision of the United States Supreme Court on the said writ of prohibition.

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THOMAS L. CHATFIELD,
U. S. D. J.

We hereby consent to the entry of the foregoing order.

BUTLER, WYCKOFF & CAMPBELL,
Proctors for Libellant.

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UNITED STATES DISTRICT COURT,

175

EASTERN DISTRICT OF NEW YORK.

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALIANA, owner of the Italian
Steamship "GIUSEPPE VERDI,"

against

British Steamship GLENEDEN, her
engines, boilers, tackle, etc.

Agreement
to Give
Security
Unless Vessel
Held Immune.

176

In consideration of the release of the steamship *Gleneden* pursuant to the annexed order from the physical custody of the Marshal for the Eastern District of New York under which she is now lying, the National Surety Company hereby agrees that unless the steamship *Gleneden* is held by the United States Supreme Court on a writ of prohibition to be prosecuted in that Court and to be applied for not later than December 23, 1918, by James Thomson Muir, master of the steamship *Gleneden*, and special claimant herein, to be immune from the process of this Court, it will give and file, or cause to be filed, a stipulation for value in the usual form in a sum to be named by the libellant not exceeding four hundred and fifty thousand dollars (\$450,000) in the District Court for the Eastern District of New York, unless the libellant elects to proceed elsewhere, in which last named event a consent on the part of the steamer *Gleneden* to an order of discontinuance without costs to either party as

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178 against the other, and for the cancellation of all bonds in this action, shall be given and filed herein.

New York, December 10, 1918.

(Seal.) NATIONAL SURETY COMPANY,
by WM. A. THOMPSON,
Vice President.

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JAN 6 1919

JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM, 1918

No. [REDACTED]

18

Original

IN THE MATTER

OF

The Petition of JAMES THOMSON MUIR, Master of the British
Admiralty Transport *Glenaden*, for a Writ of Prohibition
and/or a Writ of Mandamus

against

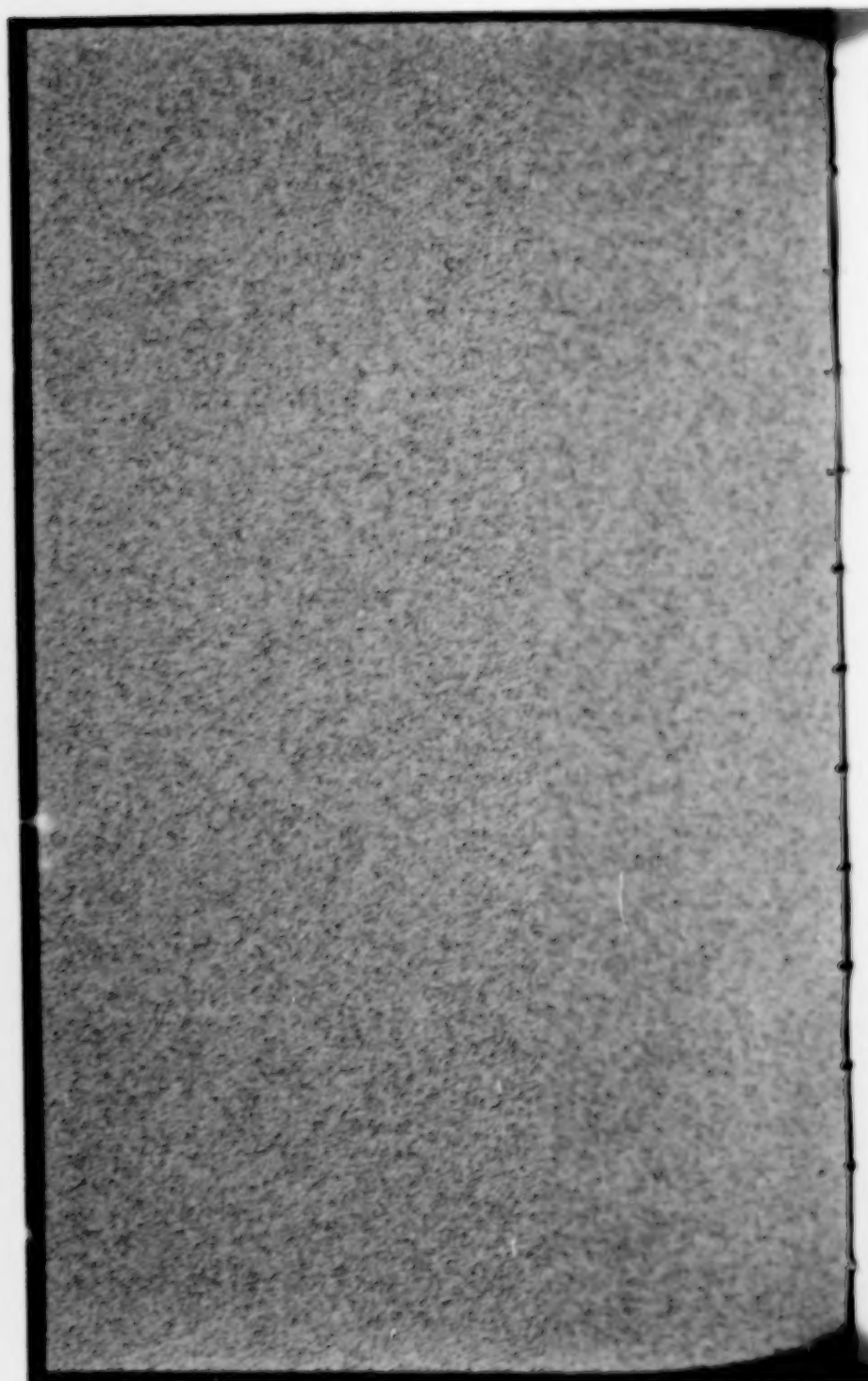
The Hon. THOMAS IVES CHATFIELD, United States District
Judge for the Eastern District of New York, and the other
Judges and Officers of the said United States District Court for
the Eastern District of New York.

BRIEF IN BEHALF OF THE PETITIONER.

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
D. M. TIBBETTS,

Counsel for Petitioner,

27 William Street,
New York City.



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SUPREME COURT OF THE UNITED STATES.

In the Matter

of

The Petition of JAMES THOMSON MUIR,
Master of the British Admiralty
Transport *Gleneden*.

October Term,
1918.

No. 28.
Original.

BRIEF IN SUPPORT OF PETITION.

This is an original proceeding for a writ of prohibition and/or a writ of mandamus against the Honorable Thomas Ives Chatfield, Judge of the United States District Court for the Eastern District of New York, on the ground that he wrongfully refused to release from arrest in a proceeding *in rem* for collision, the British Admiralty Transport *Gleneden*.

The libel, as amended, claims damages in the sum of \$400,000 for alleged injuries suffered by the Italian steamship *Giuseppe Verdi* in a collision with the *Gleneden*, alleged to have occurred in the Mediterranean. Pp. 9-15.

Upon the filing of the libel the *Gleneden* was arrested. At that time she was lying in the port of New York about ready to sail, being partly loaded with a cargo of wheat

belonging to and consigned to the British Government. Pp. 16-21.

Two days later, November 21, 1918, counsel for the British Embassy, by leave of Court, appeared as *amici curiae* and made a suggestion showing that the *Gleneden* was a British Admiralty Transport in the service of the British Government in pursuance of a requisition from the British Admiralty, was under the exclusive direction and control of the British Admiralty, and was under orders from the Admiralty to sail from New York on November 25, 1918, with a cargo of wheat owned by and consigned to the British Government. Pp. 22, 23.

Judge Chatfield thereupon issued an order to the libellant to show cause why the vessel should not be released from arrest. Pp. 20, 21.

Judge Chatfield orally ordered that the firm of Kirlin, Woolsey & Hickox should be present in Court. Fol. 151. This order apparently was made by reason of the fact that a member of said firm had appeared as proctor for the owner of the *Gleneden* in an admiralty suit in another district. Pp. 31-35. Owing to the Court's command, a representative of the firm of Kirlin, Woolsey & Hickox, though not in any way appearing in the action, was physically present in Court. Fol. 151. The special claim of the master of the *Gleneden*, petitioner herein, was not filed until November 29, after Judge Chatfield's decision and the entry of the order thereon. Pp. 54-56.

It was shown by the suggestion of the British Embassy and the master's affidavit that the *Gleneden* was at the time of the arrest and now is in the British Ad-

miralty service as a transport and entirely under the orders and control of the British Admiralty and that her master, the petitioner in this case, was also entirely subject to the orders and control of the British Admiralty and received regular pay from the British Admiralty. Fol. 77.

After various arguments, during some of which Judge Chatfield held, as he admits, fol. 143, that the rights of the British Government should be respected, he finally handed down an opinion in which he either disregarded or misread the opinions in other reported cases, which he cited, and ended by treating the *Gleneden* as a kind of hybrid vessel—public and private too. Pp. 43-48.

He, then, of his own motion, entered an order providing, after lengthy recitals, that it was:

“HEREBY ORDERED that the Marshal for this District allow the said steamship *Gleneden* to be removed by the proper representative of the British Government, upon his receipt reciting that said steamship had been received by the British Government from the Marshal of this District as aforesaid, (it being understood that the said steamship is surrendered because of the demand of the British Government to be allowed to control its movements without interference) and upon the giving of a bond by the owner for the claim in litigation or a bond to the Marshal as conditioned on the return of the boat to this District except as the needs of the British Government may keep her elsewhere while under requisition or charter by the British Admiralty.” Fols. 152, 153.

As shown in the petition, after the delay of the vessel had become unconscionable, a stipulation was entered into by which the *Gleneden* was allowed to sail, on condition that unless this Court on this writ should find the *Gleneden* immune from arrest a stipulation for value in the usual form would be given. Fols. 176, 177.

This arrangement became necessary on account of the public importance to the British Government of having the cargo on board the *Gleneden* expeditiously transported to Great Britain; and this petition is presented by James Thomson Muir, Master of the British Admiralty Transport *Gleneden*, as the bailee of the vessel, in order to ask the declaration of her immunity from arrest by this Court that she may go free of the present writ and not hereafter be interfered with by process of like character or have to give security in the case.

From the above condensed statement it will be noted that timely objection to the jurisdiction of the Court over the *Gleneden* was made by the British Government, that this objection has been insisted upon throughout and that the sole question before the District Court up to this time has been the question of whether or not the vessel, as a British Admiralty Transport, was immune from arrest under the process of the District Court.

It is contended, therefore, that the case presented is one which justifies the granting of one or both of the writs prayed, for the following reasons:

FIRST: The *Gleneden*, being a British Admiralty Transport, in the present service of the British Govern-

ment, was immune from arrest under process issued by the District Court for the Eastern District of New York and hence the District Court had no jurisdiction over the *res* against which it purposes to proceed *in rem*.

SECOND: There was and is not any other remedy which can be or could have been successfully invoked on behalf of the master as bailee of the British Admiralty Transport *Gleneden* in order to maintain her immunity and the rights of the British Government to her, because:

1. The order of the District Court is not final and does not involve a question of the jurisdiction of the District Court as a Federal Court and hence could not be brought here by appeal and certificate under §238 of the Judicial Code.

2. The order involves a flagrant and apparently intentional abuse of the jurisdiction and process of the District Court in holding a vessel, which the Court knew to be immune, in order to force the giving of security.

3. The order of Judge Chatfield was not a final order and hence was not appealable to the Circuit Court of Appeals.

4. If the *Gleneden* had complied with Judge Chatfield's order the right to claim immunity could not have been preserved so that it could have been raised on appeal after a final decree had been entered, because the bonds exacted by the order would have involved submission by the master of the *Gleneden* as principal and by the sureties to the Court's jurisdiction, and consequently the right to claim immunity would have vanished, for only a sovereign is allowed to claim that right.

THIRD: Under the Acts of Congress providing for such writs, this Court has the power to grant the relief prayed.

FOURTH: If the granting of the writs be deemed a matter of discretion rather than a matter of right, the highest considerations of public policy and comity between the Government of the United States and the Government of Great Britain and the advisability of a speedy determination of the questions presented suggest the appropriateness of this Court's using its undoubted power in the premises to assist the maintenance of the immunity of the public vessels of a co-belligerent in time of war.

FIRST POINT.

THE *Glenceden* AS A BRITISH ADMIRALTY TRANSPORT IN THE SERVICE OF THE BRITISH GOVERNMENT WAS AND IS IMMUNE FROM ARREST UNDER PROCESS OF THE COURTS OF THE UNITED STATES AND SHOULD HAVE BEEN RELEASED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK ON THE SUGGESTION FILED BY COUNSEL FOR THE BRITISH EMBASSY AS *amici curiae*.

I. The method of proving the status of the *Glenceden* as a British public ship by a suggestion filed in behalf of the British Embassy by counsel appearing as *amici curiae* was in accordance with the well established practice.

The Roseric, decided by the District Court of New

Jersey, November 22, 1918, not yet reported, but submitted with the brief of counsel for the British Embassy;

The Athanasios, 228 Fed. 558;

The Maipo, 252 Fed. 627.

The Adriatic, decided by the United States District Court for the Eastern District of Pennsylvania, unreported, except in the New York Law Journal of October 19, 1918.

The Claveresk, decided in the United States District Court for the Southern District of New York, November 12, 1918.

II. There is not any question but that on the facts shown by the suggestion of the British Embassy the steamship *Glenneden* was immune from process and the District Court should have released her forthwith on that representation.

The Exchange, 7 Cranch 116.

The Roseric, decided by the United States District Court for the District of New Jersey and submitted with the brief of counsel for the British Embassy.

The Broadmayne, 1916, Probate 64;

The Messicano, 32 T. L. R. 519;

The Erissos (Lloyd's List, October 24, 1917);

The Crimdon, 35 T. L. R. 81.

In the last named case, *The Crimdon*, 35 Times Law Reports 81, the representation made in the form of letters by representatives of the United States Shipping

Board in London annexed to an affidavit, that the *Crimdon*, which was a Swedish vessel, was under charter to the United States Shipping Board Emergency Fleet Corporation and had been assigned to the United States Army Transport Service, was accepted by the Court and the vessel was held immune.

It follows that the District Court exercised an unwarranted assumption of power in retaining the *Glenceden* under process of arrest in order to force the giving of security. For as the vessel was immune from process there was no way in which the Court could legally force an appearance by the owner of the vessel.

In our jurisprudence jurisdiction can only be obtained by personal service of process or by attachment or arrest of property.

This is clearly indicated by the recent decision of this Court in *Ex Parte Indiana Transportation Co., Petitioner*, 244 U. S. 456, in which Mr. Justice Holmes points out that "*the foundation of jurisdiction is physical power.*"

A ship must be either a public ship or a private ship. *Tucker v. Alexandroff*, 183 U. S. 424, 446.

If she was a public ship, which is conclusively proved by the suggestion of the Embassy, she was and is immune from process.

III. It has been held both here and in England that the question of the immunity of a vessel from arrest can be properly raised on an agreement such as that made here to give a bond in the event that the vessel is held not to be immune.

The Florence II, 248 Fed. 1012, 1014.

The Roseric, decided by the United States District Court for the District of New Jersey and submitted with the brief of counsel for the British Embassy.

The Crimdon, 25 Times L. R. 81, 82.

It follows, therefore, that the steamship *Gleneden* should have been held immune from the process of the District Court and that the question of her immunity is squarely before this Court on this proceeding.*

SECOND POINT.

THE JURISDICTION OF THIS COURT TO GRANT THE RELIEF
ASKED IS UNDOUBTED.

The master of the steamship *Gleneden* is and was without other remedy than such as is obtainable under the original jurisdiction of this Court. That jurisdiction is defined in Section 234 of the Judicial Code as follows:

"The Supreme Court shall have power to issue writs of prohibition to the district court, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador

*We have not attempted in this brief to deal much in detail with the question of immunity because that point is being fully covered by the brief of counsel to the British Embassy appearing as amici curiae.

or other public minister, or a consul, or vice consul is a party."

1. *There is not any other remedy.*

It cannot properly be objected that there is any other remedy available to the petitioner than the remedy herein sought.

An appeal would not have been possible either to this court or to the Circuit Court of Appeals because the order of Judge Chatfield requiring the giving of a bond was not a final order as against any party to the case.

Montgomery v. Anderson, 21 How. 386;

Cushing v. Laird, 107 U. S. 69;

McLish v. Roff, 141 U. S. 661;

Reader v. Penn. Co., 148 U. S. 392;

Hohorst v. Hamburg American Packet Company,
148 U. S. 262.

But even if the order had been a final order an appeal would not lie direct to this Court on a certificate as to jurisdiction under Section 238 of the Judicial Code, because the question arising is not a question of the jurisdiction of the United States District Court for the Eastern District of New York as a *Federal Court* sitting in Admiralty. That Court has jurisdiction of the *subject-matter of the suit*. The question presented is one of the *jurisdiction of any Court over the steamship Gleneden* arising by reason of the fact that she has been incorporated into the public forces of Great Britain and as such is *immune from the process of any Court*.

The District Court was *without jurisdiction of the party sued*, that is the vessel, and hence there is not any-

one in Court against whom the case can properly proceed. In spite of this fact, however, the District Court purposes proceeding in the matter.

The fact that the question of immunity is not a jurisdictional question in the sense of the jurisdiction of the United States District Court as a Federal Court was decided by the Circuit Court of Appeals for the Fourth Circuit in the case of *The Attualita*, 238 Fed. 909.

In that case the District Judge entered an order releasing on the ground of immunity a steamship arrested in a proceeding *in rem* for collision. An appeal was taken by the libellant to the Circuit Court of Appeals for the Fourth Circuit. It was there argued in behalf of the steamship, the appellee, that the appellant was in the wrong court and that the appeal should have been taken to this Court because it involved a jurisdictional question. The Circuit Court of Appeals overruled this position and said, at page 911 (*Italics ours*):

"The steamship says that the question involved is one of jurisdiction. The appeal should therefore have been taken to the Supreme Court. The objection which prevailed in the court below was not to the jurisdiction of the District Court of the United States *as a federal court*, but *was an objection which went equally to the jurisdiction of any court, state or federal, and for that reason the appeal to this court was properly taken.*"

That position was entirely correct and in accordance with repeated decisions of this court.

Mr. Justice Harlan in the case of *Louisville Trust Co. v. Knott*, 191 U. S. 225, said at page 233 (*Italics ours*):

“The question of jurisdiction which the Statute permits to be certified to this Court directly must be one involving the jurisdiction of the *Circuit Court* as a *federal court* and not simply its general authority as a *judicial tribunal* to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other.”

The rule is further emphasized by Mr. Justice Van Devanter in *United States vs. Congress Construction Co.*, 222 U. S. 199, in which he discussed the cases of *Louisville Trust Co. v. Knott*, 191 U. S. 225; *United States v. Larkin*, 208 U. S. 333; and *Fore River Ship Building Co. v. Hagg*, 219 U. S. 175, and said at page 201:

“In the first case, as this court was careful to state, the power of the Circuit Court under the Federal law was not in controversy, but only its authority, in the exercise of that power, to proceed in harmony with recognized rules of law applicable alike to all courts, whether Federal or state, possessing concurrent jurisdiction. In the second case, neither the interpretation nor the operation of any statute defining or limiting the power of the District Court was in issue, but only the place of seizure of jewels sought to be forfeited as fraudulently imported, which was a subsidiary matter not amounting to a jurisdictional question in the sense of the statute. In the third case, the issue related, as was expressly said, to the applicability of a rule of law which was general in its nature and quite as controlling in other courts as in those of Federal creation.”

The same distinction is recognized in *Male v. Atchison, etc., R. R. Co.*, 240 U. S. 97, and in *Workman v. The Mayor*, 179 U. S. 552, 570, 572, 574.

As has been pointed out above the order of Judge Chatfield in this case was not a final order as was the order of release made by Judge Waddill, in *The Attualita*, and hence was not appealable direct to the Circuit Court of Appeals.

That there is not any other remedy is further illustrated by the fact that, inasmuch as this Court was not in session during the latter part of November, and application for prohibition could not be made here, the master of the British admiralty transport *Gleneden* applied to the Circuit Court of Appeals for the Second Circuit for a writ of prohibition and/or mandamus against Judge Chatfield on the theory that the general appellate power which the Circuit Courts of Appeal exercise in admiralty over the district courts would authorize it to issue a writ of prohibition and/or mandamus to Judge Chatfield in this case.

Counsel for the British Embassy again intervened in the Circuit Court of Appeals, by leave of court, as *amici curiae* and presented a suggestion of immunity similar to that presented to the District Court. The matter was argued on December 6, 1918, and decided the next day. The court denied the petition and dealt with it promptly in order that the master might be able to seek such other remedy as was possible.

The Court of Appeals held that Judge Chatfield's order did not defeat the appellate jurisdiction of the Circuit Court of Appeals, and that therefore that Court had no power to interfere by prohibition or mandamus, since it could grant such writs, under Section 262 of the Judicial Code, only in aid of its appellate jurisdiction.

It accordingly declined to inquire whether Judge Chatfield's order requiring security was right or wrong and referred to Section 234 of the Judicial Code empowering this Court to issue writs of prohibition to the District Courts when proceeding as Courts of Admiralty.

The question of immunity cannot be reserved in any way, because a compliance with Judge Chatfield's order requires the filing of a bond in which the master and his sureties will have to submit themselves to the jurisdiction of the court under the regular Admiralty stipulation, a copy of which is hereto annexed as Schedule "A" hereof.

If this course has to be followed the right to claim immunity will then disappear entirely as was the case in *The Luigi*, 230 Fed. 493. For it is only a sovereign who can claim immunity, as was pointed out by Mr. Justice Hill in the Admiralty Division in the case of *The Crimdon*, 35 T. L. R. 81. At page 82 he said:

"Mr. Stephens, for the purposes of his argument, does not dispute that the gentlemen who wrote those letters were speaking as representatives of the United States Government. I mention that because, of course, the immunity from arrest on the ground that the vessel is the property or is in the employment of the Government at the time is an immunity of the State, and is not the immunity of the owners; and if the vessel is a privately owned one, but is in the use of the State, then in no circumstance has the owner the right to claim immunity. Immunity can only be claimed by the State."

The rights of the British Government can be protected only by the granting of the relief herein asked and

the important question here involved can be disposed of for the future guidance of the District Courts only by an adjudication of this court on the merits of this application.

II. *The relief prayed is appropriate and there is ample precedent for it.*

The principles applicable to these writs, in the main equally applicable to both classes of writs, are, we understand, as follows:

1. This court will grant the writ of prohibition as a matter of right where it appears that the Court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally or of some collateral matter arising therein if objection by the interested party was made in a timely fashion and there is no other adequate remedy available.

2. Both writs will be granted to restrain an inferior Court when it is proceeding by abuse of its process to an improper use of its powers.

3. Even though some less speedy or efficacious remedy may be conceivable, these writs will not be denied where the public importance of the question appears to demand speedy and decisive action at the hands of this Court.

A. *The Writ of Prohibition.*

If our premises are correct, the District Court not only had no jurisdiction of the party sued, that is of the ship, but was attempting by a flagrant abuse of process

to restrain an immune vessel and forcibly to subject the owner to its jurisdiction.

This would, therefore, appear to be a perfect case both on principle and authority for the relief by writ of prohibition asked in the petition.

The general principle to be applied on writs of prohibition is thus stated by Mr. Justice Gray in *Smith v. Whitney*, 116 U. S. 167, at page 173 (Italics ours):

“It is often said that the granting or refusing of a writ of prohibition is discretionary, and therefore not the subject of a writ of error. That may be true, where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition *as matter of right*; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in the older authorities.”

Chief Justice Fuller *In Re Rice*, 155 U. S. 396, stated the principle as follows, at page 402:

“Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter

arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right."

This language was repeated *In Re New York, etc., Steamship Company, Petitioner*, 155 U. S., 523, at page 531. Mr. Justice Clifford in the earlier case of *Ex Parte Easton*, 95 U. S. 68, at page 77, recognized the propriety of such a writ to restrain an *abuse of power* in the following language (Italics ours):

"Application for the writ of prohibition is properly made in such a case, upon the ground that the District Court has transcended its jurisdiction in entertaining the described proceeding; * * *. Such a writ is issued to forbid a subordinate court to proceed in a cause there depending, *on suggestion that the cognizance thereof belongeth not to the court.* F. N. B. 39; 3 Bl. Com. 112; 2 Pars. Ship. 193; 8 Bac. Abr. 206."

Applying the principles thus established, this Court has, as we read the decisions, been careful to deny the writ in cases where another adequate remedy exists by appeal or otherwise, for in such cases it is held to be within the right of the trial court to determine for itself the question of its jurisdiction, leaving the correctness of such determination to be reviewed upon appeal; but on the other hand the Court has been ready always to grant a writ where the petitioner brings himself within the principles properly governing its issuance.

The first reported instance of an application for the writ of prohibition made to this court is, we believe, the

case of *United States v. Peters*, 3 Dallas, 121 (1795). It is curious that in that case as here the question raised was a question of the immunity of the arrested vessel from process. The writ was granted.

In the case of *United States v. Peters*, 3 Dallas, 121, James Yard, a ship owner of Pennsylvania, filed a libel against the *Cassius*, an armed corvette belonging to the French Republic, and against Samuel Davis, her commander, to recover damages for the alleged illegal capture on the high seas of the American schooner *William Lindsey* and her cargo whilst she was on a lawful voyage from St. Thomas to St. Domingo. Davis as master of the *Cassius* made a motion on a sworn suggestion for a writ of prohibition, basing his claim to have the writ on the propositions that neither a vessel of war of the French Republic with which the United States was at peace nor her commander was amenable to the process of the courts of the United States and that questions of the prize could only be adjudicated in the courts of France, as the prize was not captured within the territorial waters of the United States and had been taken to a French port for adjudication.

Mr. Dallas appeared for the writ and contended, page 125 (Italics ours) :

“1st. *That a prohibition will lie in this case;—*
 2d. *That on the face of the libel, it was evident that the district court had no jurisdiction; 3d. That on facts disclosed in the suggestion the district court ought not to be allowed to take jurisdiction;— and*
 4th. *That the allegations of the libel itself, would not support the proceedings below.*

On the general question of prohibition he argued forcibly as follows at pages 125-126. (Italics ours):

"1. A prohibition will lie in this case. The three great objects of the judicial power are an authority—1st, to administer justice; 2d, to compel the unwilling or negligent magistrate to perform his duty; and 3rd, *to restrain the ministers of justice within the regular boundaries of their respective jurisdictions*. The judicial power is, therefore, either abstract or relative; in the former character, the court for itself declares the law and distributes justice; in the latter, it superintends and controls the conduct of other tribunals, by a prohibitory or mandatory interposition. The superintending authority has been deposited in the Supreme Court, by the federal constitution; and it becomes a duty to exercise it upon every proper occasion. The writ of prohibition is said, indeed, by the English books, to be grantable *ex debito justicie*. 1. Sir T. Raym. 3, 4, and it is certain that the constitution and laws of the union fix no limitation to the exercise of the power of this court, but, by way of implication, that it shall be warranted by the principles and usages of law. Judicial Act. S. 13."

On the point that on the facts shown by the suggestion the district court should not be allowed to take jurisdiction, it was argued that the exemption of sovereignty from process was recognized by our constitution as well as by the law of nations and that if the *Cassius* and her commander were held subject to process, every war vessel would be held to answer for its commander's acts. It was also contended that the seizure was contrary to our treaty with France.

The Court made an effort to get the libelant to agree to withdraw the libel but that having failed, two days later the opinion of the court was delivered by Chief Justice Rutledge as follows:

"We have consulted together on this motion; and though a difference of sentiment exists, a majority of the court are clearly of opinion the motion ought to be granted. Therefore,
Let a prohibition issue."

In *United States v. Peters* the Court granted the writ without assigning its reasons, but as was said by this Court in the later case of *The Santissima Trinidad and The St. Ander*, 7 Wheat., 283, in an opinion by Mr. Justice Story, at page 351, the evident reason was (Italics / ours):

"* * * that the jurisdiction in cases of this nature exclusively belongs to the courts of the capturing power, and that *neither the public ships of a nation, nor the officers of such ships, are liable to be arrested to answer for such captures in any neutral port.* The doctrine of that case was fully recognized by this court in the case of *The Invincible*, 1 W. 238; and it furnishes a rule for the exemption of a public ship from proceedings in rem, in our courts for illegal captures on the high seas, in violation of our neutrality; but in no degree exempts her prizes in our ports from the ample exercise of our jurisdiction."

There is, therefore, direct precedent in this Court for the granting of a writ of prohibition under the circumstances presented in the present case.

The later case of *In Re Baiz*, 135 U. S. 403, also involved a question of immunity. A petition was filed for

a writ of prohibition to restrain the United States Circuit Court for the Southern District of New York from proceeding with a case for the collection of damages on account of the publication of an alleged libel. The petitioner Baiz was the defendant in the action so commenced. Immunity from process in the Circuit Court was claimed on the ground that Baiz was a diplomatic representative of Gautemala and, therefore, entitled to the privilege of having his case heard originally in the Supreme Court, as provided by Section 687 of the Revised Statutes. This Court took jurisdiction of the petition, but upon final hearing on the merits found that he was not a diplomatic representative but only a commercial agent of Gautemala and the writ was, therefore, denied, not upon the ground that it was not a proper case for the character of relief sought, but because the petitioner was not *in fact* exempt from process in the Circuit Court.

Similar considerations were involved in *In Re Cooper*, 138 U. S. 404, in which an application was made for leave to file a petition for a writ of prohibition by the owner of the British Schooner *W. P. Sayward* which had been arrested by the United States authorities in the territory of Alaska for killing fur seals in the Behring Sea. It was contended by the owner that at the time of the seizure the vessel was more than three miles distant from the coast and on the high seas; and that by the law of nations she was, therefore, not subject to seizure or to any control whatsoever except by the British Government. The case had been tried on the merits and the District Court had made findings of facts and conclusions of law, holding that the vessel was within the jurisdiction of the

District Court at the time of seizure and therefore subject to the penalty provided by law for illegal sealing.

The case was heard here at length upon the application to file the petition and this Court allowed the petition to be filed, clearly indicating, we submit, that this Court was of the opinion that, as originally stated, the case presented was one which authorized the granting of the relief sought.

Upon final consideration of the case, however, the writ was denied, chiefly on the ground that the case in the District Court had proceeded to final judgment and that this Court would not in effect review the action of the trial court in the case on a petition for a writ of prohibition. *See In re Cooper*, 143 U. S., 472.

On this point Mr. Chief Justice Fuller said, at page 495 (Italics ours):

"The writ thus provided for by section 688 is the common law writ, which lies to a court of admiralty only when that court is acting in excess of, or is taking cognizance of matters not arising within, its jurisdiction. *Its office is to prevent an unlawful assumption of jurisdiction*, and not to correct mere errors and irregularities."

Relief by a writ of prohibition was granted by this Court in the recent case of *Ex Parte Indiana Transportation Company*, 244 U. S. 456, to restrain a Court of Admiralty from wrongfully permitting three hundred and seventy-three libelants to be brought into Court by amendment to the libel, when the defendant had not been served with process and had at the outset taken exception to the jurisdiction of the District Court to permit

such an amendment. The remarks in the opinion as to the basis of jurisdiction are, as has been pointed out above, much in point here.

B. *The Writ of Mandamus.*

A writ of mandamus as prayed for should also be granted that Judge Chatfield's order may be set aside and the record cleared in so far as the steamship *Gleneden* is concerned.

This case is an instance of the extraordinary abuse of process which was the cause of the decision of this Court in granting the writ of mandamus in *Virginia v. Rives*, 100 U. S. 313, of which case the Chief Justice said in *ex parte Harding*, 219 U. S. 363, at page 373 (Italics ours):

"It is obvious from the opinion of the court and the concurring opinion that jurisdiction over the case was taken *because of the extraordinary abuse of discretion disclosed by the power attempted to be exerted, the confusion and disregard of constitutional limitations which the asserted power implied, and because under the law as it then stood no power would otherwise have existed to correct the wrongful assumption of jurisdiction by the Circuit Court.*"

That mandamus is necessary in order to get the record in the District Court clear in this case by vacating Judge Chatfield's order is further indicated by a more recent decision of this Court.

In the case of *In Re Metropolitan Trust Company*, 218 U. S. 312, a case had been removed from a State Court to a Circuit Court. After removal, the Circuit

Court had dismissed the action as to the Trust Company. On appeal the Court of Appeals had directed the Circuit Court to remand the case to the State Court. The Circuit Court, although the term had expired, attempted by order to reinstate the case against the Trust Company and then by vacating its former order dismissing the case as against the Trust Company. This erroneous procedure was corrected by this Court by a writ of mandamus directing the Circuit Court to vacate its order reinstating the cause as to the Trust Company, because as the term at which the dismissal had been entered had expired, the Circuit Court was without jurisdiction to vacate the order of dismissal and reinstate the cause. Mandamus was, therefore, held to be a proper remedy to correct the error. Cf. *Ex parte Metropolitan Water Company*, 220 U. S. 339.

We submit, therefore, that the case here presented is one which properly calls for relief at the hands of this Court by the granting of one or both of the writs applied for, in accordance with the principles established by the cases above mentioned.

THIRD POINT.

CONSIDERATIONS OF PUBLIC POLICY AND COMITY BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE GOVERNMENT OF GREAT BRITAIN AND THE NECESSITY FOR A SPEEDY DETERMINATION OF THE IMPORTANT QUESTIONS HERE INVOLVED REQUIRE THE GRANTING THE RELIEF PRAYED.

The counsel of the British Embassy in their representations to the trial court stated that it was the practice of the English courts to grant immunity to vessels in the public service of other countries and suggested that, as a matter of comity and public policy, the same rule should be recognized in the courts of this country.

These representations on the part of the diplomatic representative of the British Government are repeated here and should have great weight with the courts of this country.

In addition to the consideration so involved, the obvious importance to the British Government of immunity from arrest of the vessels in her Admiralty Transport Service is such that the relief here sought should not be denied.

Furthermore this is the only procedure by which the important question involved here can be promptly and finally settled for the guidance of the courts in future cases in which vessels of the same status as the *Glenceden* may become involved, and in such cases speedy and decisive determination of the questions raised is of the essence because of their public importance to the British Government and, incidentally, to the Government of the United States.

Lastly, as a matter of comity the *Gleneden* is entitled to immunity because American vessels in a similar status are granted immunity by the English courts. *The Crimdon*, 35 Times L. R. 82.

LAST POINT.

ONE OR BOTH OF THE WRITS PRAYED FOR SHOULD BE GRANTED WITH COSTS TO THE PETITIONER.

December, 1918.

Respectfully submitted,

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
D. M. TIBBETTS,
Of Counsel.

SCHEDULE A.

DISTRICT COURT OF THE UNITED STATES,

FOR THE

DISTRICT OF NEW YORK.

Filed and Recorded the day of 190 .

STIPULATION FOR VALUE.

ENTERED INTO PURSUANT TO THE RULES AND PRACTICE
OF THIS COURT.

WHEREAS a libel was filed on the day of
190 , by

against

for the reasons and causes in the said libel mentioned;
and whereas, the said vessel is in custody of the Marshal
under process issued herein;

AND WHEREAS said libel was filed for the recovery of
a sum certain, to wit:

Dollars, which with interest to
190 (the first day of the Stated

Term next succeeding the return day of said process)
amounts to the sum of

Dollars; and the parties hereto hereby consenting and
agreeing that in case of default or contumacy on the part

of the claimant or suret , execution for the above agreed amount, with interest thereon from said Stated Term day, may issue against their goods, chattels and lands.

Now, THEREFORE, the condition of this stipulation is such that if the claimant herein and

, residing at
in the city of , and by
occupation , and

, residing at
, in the city of
and by occupation , the
stipulators undersigned, shall abide by all orders of the Court, interlocutory or final, and pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with interest, then this stipulation to be void, otherwise to remain in full force and virtue.

*Taken and acknowledged this }
day of....., 190 , before me. }*

U. S. Commissioner.

Southern District of New York, ss.:

the above Stipulators, being duly sworn, each deposes and says that he resides as above set forth, and that he is

worth the sum of
Dollars over and above all his debts and liabilities.

Sworn to before me, this
day of , 190 . }

U. S. Commissioner.

The foregoing Stipulation is hereby approved as to
form, amount and sufficiency of surety.

New York, , 190 .

Proctor for Libellant.



UNITED STATES SUPREME COURT

OCTOBER TERM, 1912

18
ORIGINAL

IN THE MATTER

THE PETITION OF JAMES THOMSON MUIR, Master of the British
ARMED VESSEL "GLORIOUS", FOR A WRIT OF HABEAS
CORPUS.

THE HONORABLE THOMAS IVES CHATHAM, United States District
Judge for the Eastern District of New York, and one of the
JUDGES AND CLERKS of the said United States District Court
for the Eastern District of New York.

BRIEF IN OPPOSITION TO PETITION

BUTLER, WISCOFF & CAMPBELL

Attorneys for the Respondent, The Glorious

United States District Court for the Eastern District of New York

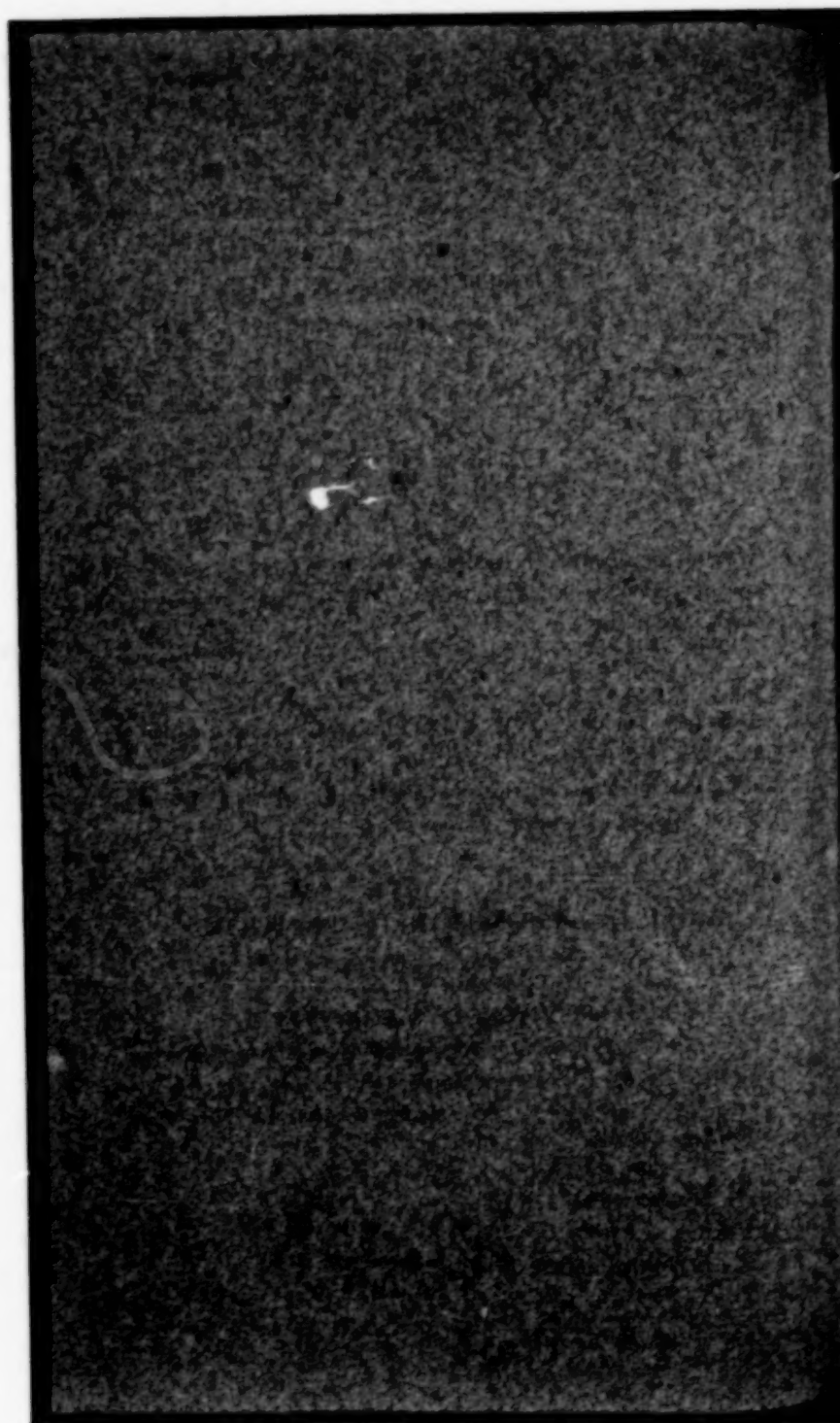
City of New York

HONORABLE L. L. LOOMIS

of the

JOSEPH A. GREGORY

ALVIN GREGORY



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Supreme Court of the United States.

IN THE MATTER

OF THE

Petition of JOSEPH THOMSON
MUIR, Master of the S. S.
Gleneden, for a writ of pro-
hibition and/or a writ of
mandamus against the Hon-
orable Thomas I. Chat-
field, United States District
Judge for the Eastern Dis-
trict of New York, and the
other judges and officers of
the said United States Dis-
trict Court for the Eastern
District of New York.

October Term,
1918.

No. 28.
Original.

BRIEF IN OPPOSITION TO THE PETITION.

Statement of Facts.

The Societa di Navigazione Transatlantica Itali-
ana, an Italian corporation, the owner of the
Italian Steamship Giuseppe Verdi, filed its libel
in the United States District Court, for the East-
ern District of New York, against the British
Steamship Gleneden, her engines, boilers, tackle,

etc., on the 19th day of November, 1918, for the recovery of collision damages sustained by the libellant in the sum of \$200,000, the claim for which was subsequently increased by amendment of the libel to \$400,000 (Pet. 9-15, 41).*

The collision was alleged in said libel to have occurred on the 28th day of July, 1917, on the high seas, to-wit, in the Gulf of Lyons, while the Giuseppe Verdi was proceeding from Gibraltar to Genoa, and was alleged to have been due solely to the fault of the British Steamer Gleneden and those in charge of her navigation.

On the filing of the libel, the Clerk of the District Court was ordered to issue a process in accordance with the libellant's prayer (Pet. 16) and process *in rem* was issued accordingly (Pet. 17-18). On the 29th day of November, 1918, the United States Marshal's return was duly made and filed, in which he certified that the Steamer Gleneden had been attached on the 19th day of November, 1918, and that he had given due notice to all persons claiming the same that the District Court would proceed to the trial and condemnation thereof on the return day, should no claim be interposed for the same (Pet. 18-19).

In the meantime, and on the 21st day of November, the so-called suggestion was filed in the District Court over the signatures of Frederic R. Coudert and Howard Thayer Kingsbury, purporting to act for the British Embassy. This suggestion was unverified and was presented to the Court, not as an appearance on behalf of the British Ambassador, but by the counsel, subscribing the same, in the character of *amici curiæ*. This suggestion, though it does not purport to be made

* This and similar references in this brief refer to the pages of the petition filed herein.

upon information and belief, obviously was so meant, as the counsel making it could, in the nature of things, have had no positive knowledge of the statements therein made. It represented, in substance, that the British Steamer *Gleneden* was engaged in the service of the British Government by virtue of a requisition, was under the direction and control of the British Government in respect to its movements, and was therefore immune from arrest under the process of the Court (Pet. 22-24). It suggested, accordingly, that the writ of arrest against the *Gleneden* be quashed and dissolved, and that all proceedings to arrest or detain the vessel should be stayed, so long as the steamer remained in the service of the British Government.

On this suggestion the District Court ordered the libellant or its proctors and the United States Marshal to show cause before him on the same day why the said writ of arrest should not be quashed and dissolved and all proceedings stayed in accordance with the said suggestion (Pet. 20-21).

At the time set for the return of this order to show cause, libellant's proctors appeared together with the counsel that had filed the suggestion and argument was had as to the merit of the motion. Libellant's proctors, at the outset, objected to the court's receiving or considering the suggestion filed, urging that it did not emanate from a source that entitled the court to entertain it (Ret. 3).^{*} The court desired further enlightenment on the subject and the said counsel appeared and argued the matter again on several subsequent occasions, in the course of which counsel who subsequently appeared specially for the Master of the *Gleneden* appeared informally at the suggestion of the District

^{*}This and all similar references in this brief refer to the pages of the Return of Judge Chatfield herein.

Judge but refused to enter a formal appearance or to participate in any way whatsoever in the argument of the motion (Ret. 3).

Proctors for the libellant denied in open court the allegations of the suggestion, and called upon the counsel making the same to submit proof of the general allegations and conclusions of law set forth in the body of the suggestion (Ret. 4-5). The position taken by the libellant's proctors is shown in the reply to the suggestion thereafter filed (Ret. 13-15).

Libellant's proctors repeatedly called upon counsel that had filed the suggestion to produce, for the court's inspection, that proof which was obviously in the possession of the ship and her master, and which would have substantially settled the question as to the vessel's immunity from arrest, on the ground of her being, as was alleged, a public ship of the British Crown, such proof consisting of the ship's articles and the instrument defining the terms whereunder she was performing service for the British Crown (Ret. 4-5). In lieu of the latter, libellant's proctors repeatedly called upon opposing counsel to produce the Master of the Gleneden for examination and cross-examination (Ret. 5). On each occasion, however, counsel arguing for the immunity of the vessel flatly refused to produce the required proof or the Master for examination and cross-examination (Ret. 5) and contented themselves with filing an affidavit subscribed by the Master of the vessel, in which he stated that he had been informed that the vessel was under requisition since October 8th, 1915, he having assumed command of her only on the 24th of September, 1918, and stated that the vessel was subject to the orders and directions of the British Admiralty and was engaged in service therefor, and

set forth his opinion that any restraint upon the departure of the vessel would "interfere with the Government service, upon which I (he) am engaged and the British program for the importation of food stuffs" (Pet. 25-26).

The Master, in preparing his affidavit, although every consideration of frankness and candor would seem to have required his deposing on the point, failed to state who paid him and the other officers, and the crew, their wages, and who had appointed them. These were facts about which the Captain could have deposed of his own knowledge, as distinguished from the conclusions of law, of which, instead, his affidavit was largely composed (Pet. 25-26).

The Master did depose, "I receive payments from the Admiralty at regular intervals". But these payments were obviously not meant to refer to his or the crew's wages (Pet. 26); else the Master would have used more explicit language on the point (Pet. 26).

Proof was subsequently supplied in the shape of the depositions of certain of the engineers and other members of the crew of the *Gleneden* (Ret. 7-10), which cleared up the question as to who paid the wages of the Master, officers and crew. This testimony showed that the wages were paid by the owner of the *Gleneden*, and not by the British Government, and also that the Master, officers and crew were appointed by the owner (Ret. 7-9).

Libellant's proctors represented to the Court that it was the libellant's understanding that the *Gleneden*, when her service had been required by the British Government, had been chartered to the Crown under the terms of the usual or Government form of time charter, the private owner, the *Glene-*

den Steamship Co., Ltd., continuing to operate the vessel through its own servants, retaining the immediate control and navigation of the steamer, remaining responsible for all marine risks and continuing in the actual possession, as well as ownership of the steamer (Ret. 6). In support of this position, which is fully indicated in the reply it subsequently filed (Ret. 13-15), the libellant filed an affidavit of Joseph A. Barrett, in which it was set forth that the Gleneden Steamship Co., Ltd., the private owner of the Gleneden, had, on the 7th day of November, 1918, filed in the United States District Court, for the District of New Jersey, a libel against the Italian steamer Giuseppe Verdi, named above, for collision damages in the sum of \$425,000, alleged to have been suffered by the Gleneden and her owner, as a result of the same collision between the Giuseppe Verdi and the Gleneden as that giving rise to the cause of action for which the Giuseppe Verdi's owner had arrested the Gleneden in the instant action (Pet. 27-30). A true copy of the Gleneden Steamship Co.'s libel was incorporated in the said affidavit (Pet. 31-35). It appeared from the affidavit of Muir in the Gleneden libel that the collision had occurred long after the time when the Gleneden was alleged to have entered into the service of the British Government, and yet, the owner of the Gleneden, in its said libel, claimed to have suffered itself (instead of the Crown) all of the damages flowing from the said collision, "including the cost of repairs, detention and loss of time and incidental expenses" (Pet. 33-34).

The owner of the Gleneden, in its said libel, denied that those aboard that vessel were in any sense in fault, and thereby seemed to assume responsibility for their conduct (Pet. 33), and al-

leged as an excuse for proceeding without lights, in violation of the international rules of navigation, the fact, not that she was in charge of and being navigated by the British Admiralty, but instead the fact that her Master had received orders "from the British Admiralty, and which he was bound to obey", requiring the Gleneden to show no lights (Pet. 32). The owner of the Gleneden accordingly prayed to recover from the Giuseppe Verdi the sum of \$425,000, the collision damages alleged to have been sustained (Pet. 34).

The Master of the Gleneden thereafter appeared and filed a claim specially as agent of the owner, the Gleneden Steamship Co., Ltd., the private owner of the Gleneden, and therein admitted that he was "the true and lawful bailee of the said steamship", his principal, the Gleneden Steamship Co., Ltd. being, as he alleged, "the true and *bona fide* owner of the said steamship", of which "no other person is the owner" (Pet. 54-55).

The foregoing facts made it pretty clear to the Court that the Gleneden was in the actual possession and immediate control of her private owner, the Gleneden Steamship Co., Ltd., and was merely engaged under the terms of a time charter in performing a special service for the British Government. But all room for argument on this question was eliminated in the various arguments before Judge Chatfield, for, before the argument had been completed, Judge Rellstab, in the District Court of New Jersey, had handed down his opinion in the case of the *Roseric*, dealing with the identical question before Judge Chatfield, and counsel arguing in support of the suggestion, in handing to the Court a copy of the *Roseric* opinion, *conceded that the facts in regard to the requisition and*

service of the Gleneden were, in all respects, identical with those set forth in Judge Rellstab's opinion touching the character of the requisition and service of the Roseric (Ret. 10). Judge Rellstab's opinion in the Roseric case showed that

"While the steamship (Roseric) is owned by a British subject, and its navigation in charge of the owner's officers and crew, who receive their compensation from such owner, it, as well as the officers and crew, is under the complete control of the British Government, and is engaged in its business as an admiralty transport, carrying such cargo, and going to and from such ports as that Government directs" (Ret. 65).

This concession on the part of counsel arguing for the quashing of the process against the Gleneden not only cleared up the question as to where the actual possession of the vessel lay, and as to who was in immediate control of her navigation, but also made it clear that the facts in the instant action were, in all material respects, the same as those the Circuit Court of Appeals for the Fourth Circuit had dealt with in the case of the *Attualita*, reported in 238 Fed. Rep. 909, in which that Court held that the *Attualita* was, despite the fact that her service had been requisitioned by the Italian Government, subject to arrest in an action commenced against her in *rem* for collision damages. Judge Rellstab in the *Roseric* case found that, while the *Attualita* had been decided before the United States had become a belligerent, nevertheless "in all other respects, the facts of that case are seemingly identical with those of the case at bar (the *Roseric*)" (Ret. 73).

Admittedly, therefore, the essential facts in the

cases of the *Attualita*, the *Roserie* and the *Glenden* are identical; that is to say, to refer to the statement of facts set forth in the opinion of the *Attualita*, 238 Fed. Rep. 909, 910, the sovereign had required the owners to navigate the ship to and from such ports and to carry such cargo as the Government, during the period of the requisition, should direct for the use of the ship. The Government paid its owners at certain fixed rates. The owners paid all the wages of the captain and crew and the other expenses of the ship, which was navigated by the captain and crew employed by the owners.

The Attualita, 238 Fed. Rep. 909, 910.

The question presented to this Court, in short, therefore, is whether, on such facts, any supposed rule of comity or public policy requires the United States District Court for the Eastern District of New York to deprive the libellant of the security that it now has for its claim (admittedly just for the purposes of this application) for collision damages in the sum of \$400,000. The Circuit Court of Appeals for the Fourth Circuit has held that there is no rule of comity or public policy requiring that result.

The District Court for the District of New Jersey has held that such is the requirement of the rules of international comity founded on public policy. And Judge Chatfield, in the instant case, has followed the case of the *Attualita*.

The record herein contains other facts which serve to emphasize those set forth in the *Roserie* and *Attualita* opinions respectively. The usual form of British requisition time charter, whereunder, as libellant is informed and believes, the

Gleneden is operating, appears in the return (Ret. 20-25). The Return shows, furthermore, that the Gleneden demeaned herself, on arrival at the Port of New York, when arrested, not as a public vessel of war, but as an ordinary merchant vessel, in view of the fact that she made the usual report required from merchant vessels, but not required from public vessels of war or mail packets (R. 8. sec. 2791, 5th sec. 5488, Comp. St. 1916, § 2 March. 1799, c. 22, sec. 31, 1 Stat. 651).

Essential Plan of this Brief.

Apart from the question of immunity, there can be no doubt of the District Court's having properly retained jurisdiction over the Gleneden.

To determine whether the Gleneden is immune, it is appropriate to consider whether her owner or her charterer, the British Government, had the actual possession. *The Othello*, *infra*; *Ackerlind v. United States*, *infra*. There can be no doubt that possession was in the private owner and its servants. *New Orleans-Belize Steamship Company v. U. S.*, 239 U. S. 202, and kindred cases have definitely settled this proposition.

Both the title and possession being in the private owner, the public policy of the United States as derived from the laws of Congress and the Courts, requires, in appropriate proceedings, the exercise of jurisdiction by our Admiralty Courts over a time chartered steamship despite the fact that the charterer thereof may be the United States. This important proposition of law was settled in *The Othello*, 5 Blatchf. 342, 18 Fed. Cas. 991, No. 10,611 (reversing in part and affirming in part *Cartwright v. The Othello*, 1 Ben. 43, 5

Fed. Cas. 231, No. 2483), decided by Mr. Justice Nelson, then an associate justice of the United States Supreme Court, while sitting as Circuit Justice in the Circuit Court, Eastern District of New York.

In connection with this case, other cases will be considered leading inevitably to the same conclusion, such as *Ackerlied v. U. S.*, 240 U. S. 531; *Gromer v. Standard Dredging Co.*, 224 U. S. 362, and *U. S. v. Goodwin*, 17 Wall. 515.

For the consideration of the more recent legislative expression of the public policy of this country reference will be had to the two cases of *The Florence H.*, 248 Fed. Rep. 1012, and the *Lake Munroe*, lately decided in the United States District Court for the District of Massachusetts, and as yet unreported, a true copy of the opinion in which is found in the Appendix of the Return (Ret. 58-61).

The public policy that does not grant immunity to private owned vessels time chartered to the United States will obviously and *a fortiori* not extend immunity to private owned vessels time chartered to foreign governments.

The Attualita, 238 Fed. Rep. 909. 30
The Wilson, 238 Fed. Rep. 423, Fed. Cas. No. 17846
Johnson Lightship Co., 237 Fed. Rep. 3-5

Certain recent English cases decided by the lower courts in that jurisdiction (*The Broadmayne* [1916], p. 64, *The Messicano*, 32 T. L. R. 519, and *The Errisos*, Lloyd's List, 24 October, 1917, pp. 5-8), were hastily considered, are opposed to previous authoritative judicial decisions in England and in any event cannot be regarded as expressive of the public policy of the United States.

The term "requisition" must not be allowed to obscure the general situation, meaning nothing more than a formal request or demand from the

government upon the private owner for the use of the latter's vessel followed by the chartering of the same to avoid her being taken over bodily from the owner. The fact that the proposal for the execution of a charter-party emanates from the government rather than from the private owner neither adds to nor detracts from the rights of the respective parties under the charter-party subsequently made. This principle is most clearly set forth in the case of *The Errisos*, Lloyd's List, 24 October, 1917, pages 5-8, and *The Broadmayne* [1916] pages 64, 73.

POINT I.

The District Court sitting in Admiralty had complete jurisdiction over the cause of action, and, apart from the question of immunity here raised, was obliged, in accordance with the settled principles of our maritime law to retain jurisdiction over the *Gleneden* until the cause was decided and the decree for libellant, if any, satisfied.

A.

This cause of action arose out of a collision on the high seas and is, therefore, *communis juris*. The fact that it was between foreigners of different nationality would not have warranted the Court's divesting itself of its jurisdiction.

The Belgenland, 114 U. S. 355;

The Maggie Hammond, 9 Wall. 435;

The Attualita, 238 Fed. Rep. 909.

"Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service should *ever** be denied justice in our courts. Neither party has any peculiar claim to be adjudged by the municipal law of his own country, since the case is pre-eminently one *communis juris*, and can generally be more impartially and satisfactorily adjudi-

*All italics herein other than those of Latin expressions, unless otherwise noted, are the writer's.

cated by the court of a third nation having jurisdiction of the *res* or parties than it could be by the courts of either of the nations to which the litigants belong. As Judge Deady very justly said, in a case before him in the District of Oregon: "The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is the Court of Admiralty within the reach of whose process they may both be found". *Berhnard v. Greene*, 3 Sawyer, 230, 235."

The Belgenland, 114 U. S. 355, 368-369.

But whatever objections to the District Court's assuming jurisdiction petitioner might have raised under other circumstances on the particular ground that the cause was one of tort on the high seas pending between foreigners, such objections are not open to him here for two reasons: They were not raised below; and petitioner by filing a libel in the United States District Court of New Jersey has affirmatively expressed his desire to have an American Admiralty Court pass upon the issues.

"Whatever doubts may exist in a case (between foreigners) where the jurisdiction may be objected to, there ought to be none where the parties assent to it."

Mason v. Blaireau, 2 Cranch. 239, 263.

The fact of the foreign nationality of both parties litigant being, therefore, removed from the consideration of the Court, the libellant is entitled to be treated to the same consideration as that he would receive were he an American.

"The citizens of either party (Italy or United States) shall have free access to the courts of justice (of either country), in order

to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives (of each)."

Article XXIII of Treaty of Commerce and Navigation between the United States and Italy concluded 23 November, 1871, 17 Stat. 845. * * *

B.

The character of the action, viz., *in rem*, is appropriate. It is a well settled principle of our Maritime Law that a ship causing damage is considered as the wrongdoer herself, liable herself for the tort and on the commission thereof burdened *eo instanti* with a maritime lien or *jus in re* in favor of the sufferer to the extent of the damage sustained.

The Barnstable, 181 U. S. 464;

The John G. Stevens, 170 U. S. 113;

Ralli v. Troop, 157 U. S. 386;

The Clar Clarita v. Cox, 23 Wall. 1;

The China v. Walsh, 7 Wall. 53.

The vessel being herself chargeable with the faults of those who may happen to be in command of her navigation at a given moment, it is quite immaterial in an action against her, the cases last above cited show, to determine where, as between owners, charterers, or navigators, the ultimate responsibility for the fault may lie.

"The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of maritime law that the ship, by whomsoever owned or navigated is considered as herself the wrongdoer,

liable for the tort and subject to a maritime lien for the damages."

The John G. Stevens, 170 U. S. 113, 120.

The libellant has therefore a valuable property right in the *Gleneden* for the enforcement of which this action was brought, and which, unless this action can be maintained, will, so far as any one can now see, be wholly lost.

POINT II.

The private owner of the *Gleneden* was without question in the actual possession of the steamer.

A.

This important fact necessarily follows from the concession made below in open Court (Ret. 10) that the facts in regard to the control, navigation and requisition of the *Gleneden* were identical with those touching the steamer *Roserie* as set forth by Judge Rellstab in the opinion handed down by him in the District Court for New Jersey in the case bearing that name. These facts were, to quote from Judge Rellstab's opinion, that

"while the steamship is owned by a British subject and its navigation in charge of the owners' officers and crew, who receive their compensation from such owner, it, as well as the officers and crew, is under the complete control of the British Government and is engaged in its business as an admiralty transport, carrying such cargo and going to and from such ports as that government directs" (Ret. 65).

The facts in the *Roseric*, moreover, Judge Rellstab found in all respects identical with those involved in the case of *The Attualita*, 238 Fed. Rep. 909, except that the latter case was decided before the United States had become a belligerent (Ret. 73). The facts presented in the latter case were, to quote from the report of that case at page 910:

"That the vessel had been requisitioned by the Italian Government; that is to say, the Italian Government had required the owners to navigate the ship to and from such ports, and to carry such cargo, as the government, during the period of the requisition, should direct. For the use of the ship the government paid its owners at certain fixed rates. The owners paid all the wages of the captain and crew, and the other expenses of the ship, which was navigated by the captain and crew employed by the owners."

The Attualita, 238 Fed. Rep. 909-910.

The form of British requisition time charter (Ret. 21) whereunder the *Gleneden* was operated shows that the master, officers and crew were appointed and employed by the owner and received their wages from the same source; that the marine risk was borne wholly by the owner and the war risk by the Crown; that the burden rested upon the owner to maintain the steamer in a thoroughly seaworthy condition; that the owner was responsible for the safe loading, carriage and delivery of cargo except for the usual sea and other perils excepted from the usual or government form of time charter; that the owner was to be paid freight at a certain rate per ton of dead weight capacity per calendar month; that in case the vessel became "incapable from any defect, deficiency, breach of

orders, or from any cause whatsoever, to perform efficiently the service contracted for", she should then be considered off hire until she was put back in seaworthy condition or again became able to render the services stipulated in the charter-party; that the vessel should obey the orders of the charterer; and finally that the charterer should have a lien on the vessel for the due performance of the charter-party stipulations in the penal sum of 1,000 pounds (Ret. 20-25).

The libel filed by the owner of the *Gleneden* in the District Court for New Jersey also showed that the marine risk was borne by the owner inasmuch as he therein claimed to have suffered all the damages flowing from the collision with the *Giuseppe Verdi* (Pet. 33-34). It showed further that the vessel was being navigated by the master as the owner's servant, excusing the master's proceeding without lights on the ground, not that the Admiralty was operating the ship without lights, but that *he* had received an order *from* the admiralty requiring him to do so (Pet. 32), just as the *Giuseppe Verdi*, also operating under a requisition of the Italian Government (Pet. 37), was obliged by an order of the Italian Naval authorities to proceed without lights (Pet. 10). The owner of the *Gleneden* in its libel furthermore assumed responsibility for the navigation of the *Gleneden* in asserting what it must have felt was a material allegation in maintaining its case, viz., that the master, officers and crew of the *Gleneden* were guilty of no fault contributing to the collision (Pet. 33).

The chief engineer of the *Gleneden* had been on her since the year 1911 as chief engineer, in which year he was appointed to that position by the owner. So far as he knew he was still employed by

the owner, receiving his wages as usual from the captain (Ret. 7).

The master of the Gleneden in charge of her at the time of the collision between that steamer and the Guiseppe Verdi had been master of the vessel for "nine years without a holiday," and when the Gleneden started from New York on the voyage on which she was arrested in this proceeding he "wanted a spell off for a voyage". He was accordingly relieved and "the owners put another man on the ship then * * * for the voyage, as far as I understand" (Ret. 8).

The third engineer had been employed by the Gleneden Steamship Company, Limited, the owner of the Gleneden, or by Gardner & Company, affiliated with the Gleneden Company (Ret. 9) for six years (Ret. 8-10). Both steamship companies had the same superintendent and in November, 1915, the Gleneden superintendent transferred him from one of the boats of Gardner & Company to the Gleneden and "the wages all over were increased at that time" (Ret. 9). The wages "have been increased since then" and when the officers and crew were paid off they received their money at the shipping office from the master in the same manner as they always did prior to the war, the master drawing the money out of the bank (Ret. 9).

The second engineer had been on the Gleneden since 1911 (Ret. 8), was employed by the owner of the Gleneden and is still in its employ (Ret. 8); he is paid off by them "at the end of every voyage".

The foregoing were the only officers of the Gleneden, apart from the wireless operator employed by the Marconi Company, examined on the Gleneden's

behalf in the action its owner commenced in the District Court in New Jersey. They all testified to the continuance of the conditions existing before the date of the requisition of the steamer in respect both to appointment and to the source of their wages.

The *Gleneden* on arriving at the port of New York on the voyage on which she was arrested made entry in the usual way provided for merchant vessels (Ret. 7, 57), although this would not have been required had she been a public ship. R. S., Section 2791 (Section 2458 Comp. St. 1916—2 March, 1799 C. 22, Section 31, 1 Stat. 651).

On the foregoing facts, which appear in this record, including those set forth in the opinions in the *Attualita* and the *Roserie* respectively, there was nothing for Judge Chatfield to do on the motion to quash the process against the *Gleneden* but to find that she was in the immediate control and possession of her owners who continued to be responsible for her navigation and to hold that she was not entitled to immunity as a public ship.

New Orleans-Belize S. S. Co. v. United States, 239 U. S. 202, 206.

In the case just cited the steamer *Stillwater* was chartered to the United States Government for certain military services during the Spanish-American war. She sustained damages from marine risks while engaged in the rendering of such services. An attempt was made to collect these damages in the Court of Claims and on the rejection of the claim in that Court an appeal was taken to this Court. The judgment of the Court of Claims, however, was affirmed by this Court, which made it clear that under the time charter there involved (in all essential respects like the one here in question) the

United States was not the owner of the *Stillwater* *pro hac vice* or in possession thereof.

"The main contest is upon the question whether by this contract the United States became owner *pro hac vice* as affecting the extent of the liability assumed. * * * But we cannot accept this conclusion. The general owner furnished the crew and a master who at least regarded himself as representing its interests since he protested against commands that he received. It agreed to deliver the cargo in good condition, dangers of the sea, etc. excepted. It assumed the marine risk. We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person. *Standard Oil Co. v. Anderson*, 212 U. S., 215. *Little v. Hackett*, 116 U. S., 366. *Reybold v. United States*, 15 Wall. 202. We conclude that the possession followed the navigation and control. The case resembles *Morgan v. U. S.*, 14 Wall. 531, not *U. S. v. Shea*, 152 U. S., 178, as in the latter it was found that the vessel was under the exclusive management and control of the Quartermaster's Department. See further *Hooe v. Grove*, 1 Cranch 214, 237. *Reed v. U. S.*, 11 Wall. 591."

New Orleans-Belize S. S. Co. v. United States, 239 U. S. 202, 206.

Not only has this Court held that a vessel in the position of the *Stillwater* (identical with the position of the *Gleneden* here), is not in the possession of the United States, but it has gone substantially further by holding that it is not even "employed in the service" of the United States within the mean-

ing of that expression as used in a statute designed to prevent interference with Government agencies. *Ackerlind v. U. S.*, 240 U. S. 531, 536-537.

There a steamship was chartered to the War Department for the transportation to Cavite, Philippine Islands, of coal belonging to and to be used there by that department of the Government. The vessel on arriving at Cavite in the performance of her charter obligations with a cargo of government coal was obliged to pay tonnage dues. The owner of the vessel thereafter sued the United States in the Court of Claims for *inter alia* the refunding of such dues, on the ground that the Philippine Tariff Act of 3 March, 1905, c. 1408, Section 15, 33 Stat. 928, 976, provided an exemption therefrom in the provision exempting from the payment of such dues "a vessel belonging to or employed in the service of the Government of the United States". This Court rejected the claim and held that in order to be "employed in the service of the Government of the United States" a vessel must be in the immediate control and possession of the United States as explained in the *New Orleans-Belize S. S. Co.* case, *supra*.

"The only other point argued is that the vessels concerned should not have been required to pay tonnage dues because the Philippine Tariff Act of March 3, 1905, c. 1408, Section 15, 33 Stat. 928, 976, exempts from them 'a vessel belonging to or employed in the service of the Government of the United States'. But it is a sufficient answer that the words do not mean every vessel that carries a ton or a cargo of coal for the Government but only one that is under the control of the United States as explained in *New Orleans-Belize S. S. Co. v. U. S.*, 239 U. S., 202, 206. The ground of the exemption is to prevent interference with the Gov-

ernment agencies but an independent carrier, such as the contractor was in this case, is not such an agency, and is not employed in the service of the Government within the meaning of the law. See *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S., 375, 382.⁷

Ackerlind v. U. S., 240 U. S., 531, 536-537.

See also:

Morgan v. U. S., 14 Wall. 531, distinguished in the *New Orleans-Belize S. S. Co. case, supra*, from *U. S. v. Shen*, 152 U. S. 178.

B.

Petitioner cannot be heard to object to the fact that the District Judge on the admission of counsel arguing for the suggestion and on the facts before him has held that the Gleneden is not in the possession of the British Government. If the suggestion was valid for any purpose it could be received only to call the Court's attention to the claim put forward and ask the Court to examine into the facts and determine whether such facts afforded a proper foundation for the claim advanced in the suggestion.

So. Car. v. Wesley, 155 U. S. 542;

Tindall v. Wesley, 167 U. S. 204;

U. S. v. Lee, 106 U. S. 196;

The Exchange, 7 Cranch 116;

Long v. The Tampico, 16 Fed. Rep. 491, 500.

In the first of the five cases last above cited in an action brought by Wesley in the Circuit Court for the District of South Carolina to recover the possession of a lot of land the Attorney-General of the

State filed a suggestion to the effect that the property in controversy was used by the State for public uses and moved the dismissal of the proceedings for want of jurisdiction. He refused however to submit the rights of the State to the jurisdiction of the Court and, so far as the record showed, the allegations contained in the suggestion were neither proved nor admitted. The suggestion was overruled and judgment entered for Wesley. The State thereupon sued out a writ of error and the case was duly brought before this Court for review, the State claiming that the suggestion bound the lower Court. This Court held that such a proposition was quite untenable. Mr. Chief Justice Fuller in delivering the opinion of the Court said :

"In addition, the record does not show that the averments of the suggestion were either *proved or admitted*, and it *certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion*. U. S. *v. Peters*, 5 Cranch., 115; *The Exchange*, 7 Cranch., 116; *Osborn v. Bank of the United States*, 9 Wheat., 738; U. S. *v. Lee*, 106 U. S., 196; *Stanley v. Schwalby*, 147 U. S., 508."

No. Cor. v. Wesley, 155 U. S. 542, 544.

The position of petitioner in claiming that the District Judge was bound by unproved, unverified and unadmitted allegations of the suggestion involves the remarkable doctrine that the District Court has no jurisdiction to determine the question of its jurisdiction in any given case but that when any one of the attorneys practicing at its Bar claims that the Court has no jurisdiction on the ground of the sovereignty of the person or thing sued the Court must at once and as a matter of course abdicate its judicial functions and dismiss

the proceeding. Such a doctrine carries on its face its own refutation.

The course pursued in this case was far less appropriate indeed than that pursued by the Attorney-General of the State of South Carolina in *South Carolina v. Wesley, supra*. There the law officer of the executive department of the Court's Sovereign did himself file the suggestion. Here no one appeared on behalf of the executive department of the United States and no suggestion was filed by that department either through the Attorney-General, the United States District Attorney or otherwise. The course pursued was that simply of one of the Court's attorneys filing an unverified statement in writing to the effect that he represented the British Ambassador, that the Glenden was in the service of the British Government, that she was therefore entitled to immunity from arrest, and that the Court should accordingly, without investigating the facts to determine whether in truth it had or had not jurisdiction, dismiss the proceeding for want of jurisdiction.

The course pursued below was indeed wholly irregular if not actually forbidden.

The Annar, 3 Wheat. 435, 446;

The Florence H., 248 Fed. Rep. 1012, 1017, par. 3.

It is submitted that the explanation for this remarkable procedure is found in the fact that counsel filing the suggestion had been led far afield by reason of some expressions to be found in one or two English cases, notably the *Parlement Belge*, 3 P. D. 197. There does appear in the report of that case a dictum on the part of the Court to the effect that the Court was bound by the position taken by the Sovereign as to the public status of

the *Parlement Belge*. But we think a careful reading of that case will show that what the Court had in mind was a decision by its own Sovereign as to the status of the ship as a political question and not the decision of the ship's Sovereign, viz., the Belgian Government. The Court in that case said at page 219:

"It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of *The Exchange*."

If in that statement the Court referred to the British Crown's having declared the vessel to be a public ship this statement might under some circumstances be correct; as for instance in a case where the sole question before the Court was a political question upon which the executive department of the Government of the forum had passed. In any event that was all that counsel were contending for in that case. The Crown's law officer appeared before the Court, not a representative of the Belgian Government, and claimed that "Her Majesty's (that is the British Queen's) declaration that the ship is a public ship is conclusive." His argument was that

"she has been declared by the Crown to be a public ship and this declaration is conclusive. The Court cannot go behind the declaration of the Crown as to the political status either of persons or things. The Crown determines what is an independent government. The Crown declares a blockade and many other cases may be put."

The Parlement Belge, 5 P. D. 197, 198.

If the British Court meant to go further and to say that it was bound by the unverified declaration of one of the members of its Bar to the effect that a foreign sovereign had declared a ship to be a public ship the Court was obviously going much further than it was required to go, and was stating a doctrine entirely at variance with the long established line of decisions of our Courts and the principles of our republican institutions.

The fact that English Courts pay far more heed to the suggestions of its own Sovereign than the Courts of this country do in the case of suggestions filed by the law officers of the executive department of a state or the United States, as the case may be, is extensively dealt with in the case of *United States v. Lee, supra*, and is again referred to in the case of *Tindall v. Wesley, supra*, but only to the end that such practice might be declared to be out of keeping with the character of our institutions, however much they might accord with the British Courts' ideas of the respect due to the British Crown's prerogative. It is submitted, however, that even the British Courts have not gone to the extent asserted by counsel for the petitioner, a fact that will quite clearly appear from a careful reading of the Court's opinion in the *Parlement Belge, supra*, and the argument of the Crown's law officer.

C.

Petitioner is equally precluded from complaining here that the facts before this Court are not more specific in respect to the character of service the *Glenceden* and her owner were performing for the British Government. Although counsel were repeatedly requested in the argument before

Judge Chatfield to produce the shipping articles and the charter party between the owner and the Crown (Ret. 5), and were also repeatedly requested to produce the master of the *Gleneden* for examination and cross-examination (Ret. 5), they positively refused to do so (Ret. 5). As a result, even if no proof whatsoever had been offered by libellant, the Court, if it had considered the question of immunity at all, would have been obliged to hold the *Gleneden* to be in the possession of her owner. It is a well-established doctrine of the law maritime as well as general law that when once the ownership of a vessel or other personal property is ascertained to be in a particular individual a presumption instantly arises that the same individual has possession thereof either in his own person or through his servants.

Joyce v. Capel, 8 C. & P. 370;

Morris v. Kohler, 41 N. Y. 42, 45;

Hibbs v. Ross, L. R. 1 Q. B. 534;

Marsden on Collisions at Sea (3rd Ed.) 68;

Vonderhorst Brewing Co. v. Amrhine, 98 Md. 406, 410-411;

Ferris v. Sterling, 214 N. Y. 249, 253;

Gulliver v. Blaurett, 14 App. Div. 523, 525;

Edgeworth v. Wood, 58 N. J. L. 463, 468;

Knust v. Bullock, 59 Wash. 141, 143.

Nor can petitioner be heard to complain, if the proofs before the Court can be considered to be in the least ambiguous or doubtful, that Judge Chatfield decided improperly, gave the libellant the benefit of the doubt and found the possession of the steamer *Gleneden* to be in the owner. It is

an established rule of evidence that when one party has in his possession complete proof on a controverted fact and fails to produce the same on notice every inference warranted by the evidence offered will be indulged in against him.

Wylde v. Northern R. R. Co. of N. J., 53 N. Y. 156;

Re Cargo of Brig Aurora v. U. S., 7 Cranch 382, 386;

The Luminary, 8 Wheat. 407;

Clifton v. U. S., 4 How. 242, 247.

Indeed the foregoing presumption against one refusing to produce proofs obviously in his possession arises even against the defendant in a criminal case.

Graves v. United States, 150 U. S. 118.

Similarly when a party having strong evidence peculiarly within his power that would, if produced, throw light on the subject in dispute (as for instance the ship's articles and the charter-party in the instant case), refuses to introduce it, but puts in weaker evidence (as for instance here the general allegations and conclusions of the suggestion and the master's affidavit), the suspicion is thereby created that the stronger evidence would have been to his prejudice.

Clifton v. U. S., 4 How. 242, 247-248;

Runkel v. Burnham, 153 U. S. 216, 225-226.

Not the least of the remarkable features presented by this case is the attitude of the petitioner in complaining because Judge Chatfield has found the possession of the *Gleneden* to be in the owner and that she was therefore not entitled to the immuni-

ties of a public ship and at the same time in steadfastly refusing to come forward and put in the proof he alleges he has that would settle the controversy in his favor.

In a case somewhat like the present Sir William Scott refused to consider an affidavit like that filed in the District Court by the master of the *Gleneden*. *The Lord Hobart*, 2 Dodson, 100.

The Lord Hobart was a packet owned by a private individual but engaged in the service of the British Post-office in carrying mails of the general post-office and government despatches between England and the Leeward Islands. It was arrested by a mate and surgeon for wages claimed to be due them. Sir William Scott overruled the objection of the private owner to the exercise of the Court's jurisdiction, from which it was claimed that the ship was immune because of its being a Government agency. In support of the objection the owners of the packet filed an affidavit. Of this the Court said :

"In disposing of this case I must consider the objections as they arise on the petition (of the plaintiff's) itself, without paying any attention to the statement contained in the affidavit of the owner, *which I cannot allow to be used for any other purpose than to account for the non-production of the ship's articles.*"

The Lord Hobart, 2 Dodson, 100, 103.

The affidavit filed by the petitioner below in this case did not even purport to account for the non-production of the ship's articles and, therefore, Judge Chatfield would have been quite justified in refusing to give it any consideration whatsoever, in the light of Sir William Scott's ruling in the case last cited.

POINT III.

There is no rule of comity recognized in the public policy of this country, as expressed by its Courts and by Congress, requiring the extension of immunity from the process of its civil courts to vessels time chartered to a sovereign but remaining in the possession of and operated by the private owner.

The comity by virtue of which Courts of one sovereign waive their jurisdiction over the person and property of another sovereign coming within the reach of their process is founded upon considerations of public policy. While the sovereign himself is, in the last analysis, possessed of complete jurisdiction over any other sovereign or the property of any other sovereign coming within his dominions in the pursuit of peaceful purposes, the Courts of the former consider that it is their sovereign's wish, and that their sovereign has tacitly consented, to refrain from exercising such potential jurisdiction over the person of the visiting sovereign and over certain of his public property when it is in his possession. The reason for the Court of one sovereign's attributing to such sovereign tacit waiver of jurisdiction over the person of another sovereign and such of his public property as is in his possession has been discussed in many cases, but nowhere perhaps in a more illuminating manner than in the following cases decided by this Court, viz.:

The Exchange, 7 Cranch 116;

The Santissima Trinidad, 7 Wheat. 283;

The Davis, 10 Wall. 16;

Workman v. The Mayor, etc., of New York, 179 U. S. 552.

From these cases it appears to be sufficiently clear that the foundation for the principle of implied waiver of jurisdiction is the sense of the Courts that it is in the public interest that the immunity their own sovereign possesses within his own dominions from the process of his Courts should be enjoyed by him when he, or public property in the possession of his servants, may happen to be in the territory of another sovereign. If the Courts of the one did not yield such jurisdiction over the person or the property of the other, they could not expect the Courts of the latter to yield his jurisdiction, when in a position to exercise it, over the person or the property of the former. The rule of comity as applied in the Courts of any one country, depends, in other words, on the view the Courts of that country adopt as to the requirements of a sound public policy for the nation that they serve.

The Exchange, supra.

The Courts of any one country will, therefore, extend immunity to the person of a foreign sovereign and the public property in his or his servants' possession to the extent, and only to the extent, that they deem it to be in the public interest of their country that their own sovereign's person and public property should be held immune while in the territory of a foreign sovereign from subjection to the process of the latter's Courts. If in the construction of a sound public policy the Courts of one nation determine that the public interest of their nation requires that the public property of their own sovereign, when not in his possession shall be subject to the process of his Courts, it necessarily and *a fortiori* follows that they will

construe the same public policy as requiring the exercise of jurisdiction by them over the public property of the foreign sovereign when within the reach of their process and not in such sovereign's possession.

Long v. The Tampico, 16 Fed. Rep. 491, 500;

The Attualita, 238 Fed. Rep. 909.

See *Wells v. ...* 115, 181 *Cal.* 420, 30 *F.2d* 222, 22, 1784
Johnson Light House Co. 231 *F.2d* 365

It becomes necessary therefore, in order to determine whether and to what extent the steamer Gleneden is immune from the process of the United States District Court, to ascertain the public policy of the United States in its relation to this question. The expression and the definition of our national public policy is found in three different quarters, viz., the United States Constitution, the Laws of Congress and the decisions of the Courts of the United States. *Vidal v. Girard*, 2 How. 127. These three classes of authority must, therefore, be looked to in order to determine to what extent it is in the public interest that the Gleneden should be held immune from process.

A.

The Constitution provides that no person shall be deprived of his property without due process of law, and in other respects has indicated it to be in the public interest that property rights should be respected and jealously preserved against violation. The sovereign itself may not deprive a private individual of his property, even for public purposes, without giving in return just compensation. The libellant in the instant action has a property right, a *jus in re*, in the steamer Gleneden, as set

forth in Point I, *supra*. He has proceeded to enforce this right, for the due realization and reduction to possession of which the Gleneden process is now effective. It is fundamental that public policy requires that he shall not be deprived of this security (which is property) without a trial of the merits of his claim, so long as he voluntarily waives none of his rights thereto, unless there is some other phase of public policy as it has been construed and applied by the Courts of the United States, that requires in this case the summary and extraordinary destruction of his property rights.

B.

That there is no feature of our national public policy requiring this extraordinary separation of the libellant from his property in the Gleneden clearly appears, it is submitted, from the decisions of the Courts of the United States. The question whether a vessel time chartered to the government of the United States for the performance of public services, but remaining in the possession of its private owner and his servants while rendering such services, is immune from arrest on grounds of public policy, has already been considered by a former Associate Justice of this Court, Mr. Justice Nelson, while sitting as Circuit Justice in the Eastern District of New York. He held that such a vessel was subject to the process of the Admiralty Court and refused to release her on the suggestion of the United States District Attorney, acting at the instance of the Executive Department of the United States.

The Othello, 5 Blatchf. 342, 18 Fed. Cas. 901, No. 10611.

In that case it appeared that the Schooner Othello had been chartered by her owners to the Government of the United States in the closing days of the Civil War, at the rate of \$50 per day, for an indefinite period of time, the owners to victual, man and navigate the vessel, and transport therein such property as might be tendered by the Quartermaster of the United States Army. The vessel, according to the charter party, was to be kept fit for service by her owners and all sea risks were to be borne by them. While she was proceeding under this charter in the command of her master, not an officer in the service of the United States but appointed and paid by the owners, with a cargo of ordnance and ammunition that had been captured by the Army of the United States, from Wilmington, North Carolina, to New York, she met with disaster at sea and was compelled to put into St. Thomas for repairs. The master, in order to raise money for the purpose of repairing the vessel and enabling him to prosecute his voyage, executed a bottomry bond on both vessel and cargo in a sum exceeding \$15,000. When the vessel reached New York the bond not having been discharged, a libel was filed in the Eastern District for New York against both vessel and cargo and they were taken into the custody of the Marshal under Admiralty process issued in accordance with the prayer of the libel. Before any appearance had been entered, the United States District Attorney, on behalf of the Executive Department of the United States, moved upon affidavits for an order directing the release of the property and the quashing of the process, on the ground that "the cargo was conceded to be the property of the United States, and that *by virtue of the peculiar provisions of the charter party referred to, the vessel also was, in law, gov-*

ernment property, a process of the Court dismissed the libel on was taken to the Circuit Court, sitting as Circuit Court. Mr. Justice Nelson, heard the appeal and affirmed its ruling as to the immunity of the

"On the true cargo. He said: party, I am not satisfied that the government was the owner of the Schooner *pro hac vice*. I think that the master, retained the general owner, through the possession and navigation of the vessel; and that at the hiring rested in control below possessed respects the vessel the Court on the merits. jurisdiction to hear the case

"The cargo belonged to the United States and was in their possession as shippers of it. As such it was not subject to seizure or attachment by the government. A suit be instituted against the government in respect to it. * * *

"The decree as to the vessel is reversed and the vessel will be heard on the merits."

The Othello

901, No. 5 Blatchf. 342, 18 Fed. Cas. 9611.

The report of the case under the name of *Othello*, 1 Ben. 43, 5

Thereafter the owner of *The Othello* sued the United States in the Court of Claims to recover, the custody of the vessel while detained in period of more than four months and a half, during all of which time she remained in the service of the United States. The Court of Claims rejected the

claim, and the owner appealed to this Court. Here the judgment of the Court of Claims was affirmed.

Goodwin v. U. S., 17 Wall. 515, 517.

Mr. Justice Swayne, delivering the opinion of this Court, said:

"The claim of *per diem* compensation for the time the Marshal held the vessel is the only ground of controversy between the parties, and it is the only subject open for examination in this case.

"During that time she was in the custody of the law and she was in nowise in the employment of the United States nor subject to their control. She did not and could not render them any services while thus held.

"The United States had not stipulated to pay in such a contingency. *On the contrary the detention was incident to the marine risk which the owners had expressly assumed. It was a fruit of that peril.* The United States are not blameworthy and not responsible. *The contract puts all such burdens upon the shoulders of the owner. Those burdens cannot be shifted and thrown upon the other party.*"

Goodwin v. U. S., 17 Wall. 515, 517.

The *Goodwin* case, *supra*, is significant in connection with the present consideration of the *Gleneden*, in view of the fact that it holds that any detention of the vessel in the hands of the marshal by reason of claims growing out of marine risks, is an incident of the marine risk and therefore one of that class of risks which the private owner agrees with his government to assume the burden of. The owner of the *Gleneden* admittedly assumed all marine risks in his contract with the British Crown. He thereby, under the *Goodwin* decision, expressly agreed in case the *Gleneden* should be arrested for

collision damage, to effect her prompt release or suffer himself the consequences of her detention during the period of her custody in the hands of the marshal. It hardly lies in his mouth to complain here of the detention of the *Gleneden* under the process issued in the present action, when he had expressly assumed the burden of procuring the release of the vessel in his contract with the British Government. The British Government stands in no better position, for it has a contractual right against the owner of the *Gleneden* to have the vessel released through his efforts, viz., the giving of a bond as speedily as possible. In insisting upon the immunity of the vessel rather than upon the owner's performing his contractual obligation, the British Government is in effect seeking to transfer the burden of effecting the release of the vessel from the shoulders of the *Gleneden's* owner, where it rightfully belongs, to the shoulders of the innocent sufferer from the wrongdoing of the *Gleneden*, viz., the owner of the *Giuseppe Verdi*. But, as this Court said in the *Goodwin* case, that burden "cannot be shifted and thrown upon the other party".

The Circuit Court of Appeals for the Fourth Circuit, in the case of *The Attualita*, 238 Fed. Rep. 909, although apparently not having had its attention called to the case of *The Othello*, *supra*, reached the same conclusion as that arrived at by Mr. Justice Nelson, and applied his reasoning to the case of a vessel requisitioned, not to the United States but to a foreign sovereign, viz., the Italian Government.

There can be no doubt that the *Attualita* decision was quite in accordance with our public policy; for if Mr. Justice Nelson's decision in *The Othello* was correct, to the effect that public policy did not re-

quire the release from process of a private owned vessel time chartered to the United States when in the possession of its owner, it inevitably and *a fortiori* follows, as indicated above in this point, that a private owned vessel, time chartered to a foreign government, is not required under our national public policy to be released from process when in the possession of its owner. The Circuit Court of Appeals in deciding *The Attualita*, left no doubt as to how it stood on the question of public policy:

"It is asserted that the steamship is immune to proceedings in any Court. It is admitted that to give this immunity it will be necessary to take a step beyond that which has been taken in any decided case, although it is argued that the logic of some decisions heretofore made require that step. We are frankly reluctant to take it. There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is in any way responsible. For actions of the public armed ships of a sovereign and of boats, whether armed or not, which are in the actual possession, custody and control of the nation itself, and are operated by it, the nation would be morally responsible, although without her consent not answerable legally in her own or other Courts. For the torts and contracts of an ordinary vessel, it and its owners are liable. But the ship in this case, and there are now apparently thousands like it is operated by its owners, and for its actions no government is responsible at law or in morals.

"The persons in charge of the navigation of the ship remained the servants of the owners and are paid by them. The immunity granted to diplomatic representatives of a sovereign, to its vessels of war, and under some

circumstances to other property in its possession and control, can be safely accorded, because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question, and the dignity and honor of the sovereignty in whose service they are, make abuse of such immunity rare. There will be no such guaranty for the conduct of the thousands of persons privately employed upon ships which at the time happen by contract or requisition to be under charter to sovereign governments."

The Attualita, 238 Fed. Rep. 909.

The Circuit Court of Appeals therefore reversed the District Court, which had held the vessel immune from arrest.

The Attualita, *supra*, is in full accord with the latest expressions of this Court's view of the requirements of our national public policy in reference to the immunity of vessels chartered to sovereign governments.

Ackerlind vs. U. S., 240 U. S. 531;

Gromer v. Standard Dredging Co., 224 U. S. 362, 371;

Ohio River Contract Co. v. Gordon, 244 U. S. 68, 71;

Baltimore Shipbuilding & Drydock Co. v. Baltimore, 195 U. S. 375;

United States v. Ansonia Brass & Copper Co., 218 U. S. 452, 469-472, 472-476.

See also The Davis (10 Wall. 16); U.S. v. McGregor & Sumner, 308 F.2d 101; The Pacific (10 Wall. 16); U.S. v. Johnson, 218 F.2d 101.

In *Ackerlind v. U. S.*, *supra*, a steamship chartered to the United States and engaged in the carrying of coal for military purposes to Cavite, Philippine Islands, was held not to be immune from the payment of tonnage dues at Cavite and as not only not in the possession of the govern-

ment but not even "employed in the service of the government", within the meaning of a statute exempting vessels from the payment of such dues when "belonging to or employed in the service of the government of the United States".

"The only other point argued is that the vessel's concern should not have been required to pay tonnage dues because the Philippine Tariff Act of March 3, 1915, c. 1418, Section 1508, 37 Stat. 976, exempts from them 'a vessel belonging to or employed in the service of the government of the United States'. But it is a sufficient answer that the words do not mean every vessel that carries a ton or a cargo of coal for the government, but only one that is under the control of the United States, as explained in *New Orleans-Belize Steamship Company v. United States*, 239 U. S. 202, 206. The ground of the exemption is to prevent interference with government agencies; but an independent carrier such as the contractor was in this case, is not such an agency, and is not employed in the service of the government within the meaning of the law. See *Baltimore Shipbuilding & Drydock Co. v. Baltimore*, 195 U. S. 375, 382."

Ackerlind v. U. S., 240 U. S. 531, 536-537.

The *Ackerlind* case is thus an express authority on the point that a vessel like the *Gleneden* is not employed in the service of the British Government to such an extent as to become a government agency. This disposes decisively of petitioner's contention that the *Gleneden* should be released because of her being an instrumentality of the British Government.

This Court has thus decided that it is contrary to our national public policy that immunity should be granted to a steamer time chartered to the United

States for the performance of public services, but continuing in the possession of her private owner. It would be a strange public policy indeed that would then countenance the granting of immunity to a ship time chartered under like conditions to a foreign government. This Court's construction of the statute in question shows the extent to which it considers itself bound to go under the public policy of this country in denying immunity to vessels that may happen to be performing services for this or foreign governments.

In *Gromer v. Standard Dredging Co., supra*, the dredging company had entered into a contract with the United States to dredge certain portions of the harbor of San Juan and the channel leading from the Ocean to the harbor area. To perform the contract of dredging it took into the harbor of San Juan one dredge, two tugboats, two scows for dumping material to be removed, one coal scow and one launch. This property was owned by the dredging company, was used constantly by it in the performance of its contract, was not used in connection with any other business or operations, and was at all times within the harbor area where the operations required by the contract were carried on. Porto Rico assessed and levied a tax upon this property, and the treasurer of the Island Government, Gromer, levied an embargo on it and was threatening to foreclose it and sell the dredges, machinery, boats, etc. The dredging company sought an injunction restraining the threatened seizure of the boats by Gromer, who demurred to the dredging company's bill. The demurrer was overruled and a permanent injunction granted. On appeal to this Court the dredging company sought to justify the judgment below on the ground, among

others, that the dredges, machinery and boats constituted instrumentalities of the United States Government and were not subject to be seized and sold for taxes. This Court reversing the lower Court, held that the public purpose for which the dredges, machinery and boats were being used did not render them immune.

"There is an allegation in the bill that the property was not 'subject to any lien or burden of taxation while being employed in the performance of its said contract with the United States of America and within said harbor area'. It is not clear what is meant by the allegation. So far as it means that the property is an instrument of the national government and not subject therefore to local taxation, the contention cannot prevail. *Baltimore Shipbuilding & Drydock Company v. Baltimore*, 195 U. S. 375, 382. Indeed, the contention is a very broad one and would seem to be independent of the situation of the property, and if true at all would apply to property employed in the service of the United States wherever situated and no matter to what extent employed."

Gromer v. Standard Dredging Co., 224 U. S. 362, 371.

Two of the Justices of this Court dissented from the decision, but, on other grounds, agreeing in the dissenting opinion at page 373 "that the use of the property for government purposes does not exempt it from taxation" and stating that they "therefore do not dissent from anything that is said in the opinion of the Court upon those subjects".

The Exchange, 7 Cranch 116, has been treated as the leading case in support of the theory that public policy requires that the warships of a foreign government when within the reach of the process of

our courts would be held immune from their jurisdiction. Mr. Chief Justice Marshall throughout his opinion, however, used the terms "public armed ship", "armed national vessel" and "national armed vessel" in referring to *The Exchange*. This apparently studied use of terms would lead one naturally to inquire whether Mr. Chief Justice Marshall had it in mind that a private armed ship of war, that is, a privateer duly commissioned by its government, would be, in his opinion, subject to arrest, as distinguished from a public armed ship. To one agitated by this query it is particularly refreshing to find that in 1820, or just eight years after *The Exchange* had been decided, Mr. Chief Justice Marshall, sitting as Circuit Justice in the District of Virginia, was called upon to consider a case involving the arrest of a private armed ship of war (*The Wilson v. U. S.*, 1 Brock. 423, 30 Fed. Cas. 239, No. 17846). *The Wilson* was a privateer duly commissioned by The United Provinces of Venezuela and New Granada and belonging to a private citizen of that country. It was libelled by the United States in the United States District Court for the District of Virginia, and seized on the claim of forfeiture for failure to make a full report and entry of the goods aboard it and for violation of the Act of Congress prohibiting the importation of Negroes. The answer of the master to the libel set forth in full the status of the vessel as above disclosed, the fact that the goods were not destined for importation and the fact that the Negroes were part of the privateer's crew. The District Court condemned her. On appeal, however, Mr. Justice Marshall, sitting as Circuit Justice, reversed the ruling of the Court below and ordered restitution of the vessel.

The ground upon which the Chief Justice reversed the lower Court was that the law requiring vessels to enter the custom house of the port of arrival did not apply to privateers not engaged in trade but destined and purposing only to cruise the seas in quest of enemy property, and on the further ground that the act prohibiting the importation of Negroes had no reference to Negroes arriving in a United States port in a ship on which they constituted a portion of the crew. The case is interesting however in this connection, because of the fact that its status as a private armed ship of war, duly commissioned as a privateer by a foreign government, duly appears on the face of the pleadings, and the Chief Justice gave the case unusually full consideration, writing an exhaustive opinion on the status of privateers and considering at length the distinction between national armed ships and private armed ships. It seems perfectly obvious under these circumstances that if he had considered a private armed ship as immune from arrest he would have so held and ordered the immediate release of the vessel. The circumstances of the privateer case must have vividly recalled to his mind the case of *The Exchange*, in which he had held that a public armed ship of a foreign sovereign was immune from arrest by reason of the tacit assent of the sovereign of the forum, and must be released when that fact is made sufficiently to appear to the Court. He must have recalled, too, that he had said in the case of *The Exchange*:

"Certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception."

Nor could he have reasonably be thought to have forgotten that he had also remarked in the case of *The Exchange*:

"Without doubt the sovereign of the place is capable of destroying this implication (of exemption by the consent of the sovereign of the place). He may claim and exercise jurisdiction either by employing force or by subjecting such vessel to the ordinary tribunal. But until such attempt be exercised in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals the jurisdiction which it would be a breach of faith to exercise."

With those sentiments in mind the Chief Justice simply could not have retained and continued to exercise jurisdiction over a private armed ship of a foreign sovereign, admitted by the pleadings to be such, if he had in fact considered her entitled to immunity. Yet he *did* retain jurisdiction over the privateer, and this fact, it is submitted, shows conclusively that in his opinion a sharp line was to be drawn between public armed ships of war and private armed ships of war in respect to the question of immunity.

Petitioner can hardly claim that the *Gleneden* was more of a government agency or instrumentality than the *Wilson*. The *Gleneden* had no commission from its sovereign; the *Wilson* had been duly commissioned by its sovereign as a privateer. The *Gleneden* was carrying mercantile cargoes; the *Wilson* was sailing the seas in search of enemy property. The *Gleneden* might remotely have aided in the prosecution of the war through carrying food to the civilian populations of the allied countries; the *Wilson* wore a garb of military character and was actively engaged in hunting down the enemy.

The Gleneden was a ship of trade; the Wilson a cruiser of war. Surely if our national public policy, as interpreted by the author of the opinion in *The Exchange*, required the exercise of the District Court's jurisdiction over the Wilson, the same national public policy requires in an infinitely greater degree the retention and exercise of the same jurisdiction over the Gleneden.

It seems a work of supererogation to cite more cases to show that the Gleneden is not immune from process under our public policy as interpreted by the decisions of our Courts. But it should be noted that the contention of the petitioner would, if logically carried out, require the immunity of horses and wagons employed by their owners in private work for the national government under contract. Yet it has recently been held that such property, even when employed in the service of the United States on a federal reservation, in the actual custody of officers of the United States, is subject to arrest.

Occidental Const. Co. v. U. S., 245 Fed. 817, 822 (C. C. A. 9th Circuit) ;

U. S. v. Moses, 185 Fed. Rep. 90 (C. C. A. 8th Circuit).

Petitioner's contention, logically carried out, would also require the granting of immunity to an individual or a corporation engaged under contract with the United States in the construction of public works on a federal reservation. Yet immunity has been denied by this Court in just such a case.

Ohio River Contract Co. v. Gordon, 244 U. S. 68, 71.

"We at once put out of view the contention that the trial court was without jurisdiction, because the parties at the time of the accident

were engaged in work under a contract with the United States Government, since the want of merit in the proposition has been previously established. *Groner v. Standard Dredging Co.*, 224 U. S. 362, 371."

Ohio River Contract Co. v. Gordon, 244 U. S. 68, 71.

C.

Not only have the Courts of the United States, through their decisions, interpreted the public policy of this country as opposed to the extension of immunity in such a case as that here involved, but Congress has in various laws, enacted at different times, expressed its sense of what a sound public policy requires to the same effect.

The United States Shipping Act of September 7th, 1916, c 451, Section 9 (Section 8146c, Comp. St. 1916, 39 Stat. 730), has provided that vessels owned and operated by the United States Shipping Board, while engaged as merchant vessels, would be subject to process in the same manner and to the same extent as merchant steamers owned and operated by other private owners.

"Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein, as owner, in whole or in part, or holds any mortgage, lien or other interest therein".

In keeping with the public policy so expressed in the Shipping Act, the Executive Department of the United States in requisitioning private owned vessels, has expressly stipulated in the requisition charters hereunder it has contracted for the services of such vessels, that they shall be subject to

process in the same manner and to the same extent as non-requisitioned merchant vessels, and that the owners shall take prompt steps to effect their release through bonding from the custody of the Marshal when arrested for maritime torts or the breach of maritime contracts.

The third paragraph of the requisition time charter form contains the following stipulation:

"the vessel, while being so operated by the owner, shall *not* have the status of a Public Ship, and shall be subject to all laws and regulations governing merchant vessels, and the owner shall take all proper steps to prevent any suit or process from interfering with her service" (Ret. 34).

Under the Emergency Act of June 15, 1917, c. 29, Sec. 1 (Comp. St. Sec. 3115 1/16*d*) the President was authorized:

"(a) To place an order with any person for such ships or material as the necessities of the government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person. * * *

"(c) To purchase, requisition, or take over, the title to or possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof or charter of such ship."

It has been held in at least two cases that ships the title to or the possession of which was acquired by the United States under the Emergency Legislation last quoted are subject to arrest even though carrying government cargo to the countries asso-

ciated with us in the prosecution of the war and to that extent assisting in the prosecution of the war and to

The Florence II, at cause.

The Lake Mun 248 Fed. Rep. 1012;

Morton in the *loc* (decided by Judge a copy of whose district of Massachusetts, 37 of the *Re* opinion appears at page 1011).

In the former case Judge Southern District of New York Learned Hand in the 9 of the Shipping Act, a York, held that Section purpose that all such vessels, "shows an express mercantile marine of these shall form part of the interpreted that section of country"; that is, he impressing the sense of the Shipping Act as ex-States that our national Congress of the United such vessels should continue public policy required that at the instance of private be to be subject to arrest

He then considered the suitors.

Florence II, in carrying question as to whether the French Government and a cargo belonging to the France on this vessel, about to be transported to merchant vessel". On this "employed solely as a

is point he says:

"I do not apprehend the cargo made the fact that mere ownership of other than that of the employment of the vessel *II*, of course, may be usual 'merchant vessel' the fact, that the cargo and indeed is likely to be ment of national cargo was carried in fulfillment. Moreover, agreements between the two of war, it would be under the modern practice take any line of line extremely difficult to understand a part of the militation between what was ment and any ordinary policies of the government. It may indeed be that mercantile activities, that the cargo owner fact here, for example, ment was being loaded by the French Government as a part of a vessel of the United States as a part of a vessel of the United States the allied military opera-

tions of the two and that the vessel could hardly therefore be treated as though it were employed solely as a merchant vessel. Yet the point is no ~~question~~^{not a question} even suggested and the stipulation contains nothing of the sort."

The Florence H., 248 Fed. Rep. 1012, 1015.

Judge Morton's opinion in *The Lake Munroe*, *supra*, likewise was based upon the theory that Congress in the Shipping Act had expressed its view that the public policy of the country required that vessels requisitioned by the United States, even though the title itself was taken over by the Government, should continue subject to the process of our Courts.

This being so, petitioner can hardly contend that Congress intended to express a public policy that would grant immunity to ships requisitioned in like manner by various governments. It would be a strange public policy indeed that would require our own sovereign's property to be subject to arrest and extend immunity to the like property of foreign sovereigns. Obviously Congress meant by the legislation in question to indicate a public policy extending immunity to no requisitioned ships, whether of the United States or a foreign government, even when owned by the sovereign, unless actually in the possession of and operated by the sovereign; thus placing the seal of legislative approval on the decisions of our courts holding actual possession in the sovereign to be a condition precedent to the granting of immunity.

The Davis, 10 Wall. 16;

The Siren, 7 Wall. 153, 185;

Long v. The Tampico, 16 Fed. Rep. 491, 500;

United States v. Wilder, 3 Sumn. 308, 8
 Fed. Cas. 601, No. 16,694;
The Johnson Lighterage Co., No. 24, 231
 Fed. Rep. 365.

And as to requisitioned vessels, both owned and operated by the private owner, who can have any doubt as to the real intention of our national law-makers?

In the early days of our national existence Congress in enacting R. S., Section 2791 (Section 5488 Comp. St. 1916, Act 2, March, 1799, c. 22, Section 31, 1 Stat. 631), seemed to indicate a similar view as to what the public policy of this country required; that is, that vessels even owned by or in the possession of foreign governments when engaged in trade should not be entitled to the immunities of vessels of war. The Act in question read:

"It shall not be necessary for the master of any vessel of war or of any vessel employed by any prince or state as a public packet for the conveyance of letters and despatches, and not permitted by the laws of such prince or state to be employed in the transportation of merchandise in the way of trade, to make report and entry."

The Act of 17 December, 1813 (3 Stats. 88) c. 1, expressly exempted from the embargo placed by that act on all vessels entering a port of the United States, cleared or not cleared, "all public armed vessels possessing public commissions from any foreign power", but the same act in Sections 16 to 19 provided that privateers commissioned by foreign governments or by the United States Government, might be searched by the collectors of revenue in the various districts to determine whether they

had on board any cargo for exportation, in which event

"the captain or other commanding officer and each and every of the owners of such private armed vessels shall be fined in a sum not exceeding One thousand pounds each."

Act of 17 December, 1813 (3 Stats. 88) c. 1, Section 19.

This Congressional Act of 1813 serves to show that Congress shared the view of Mr. Chief Justice Marshall as indicated by his action in *The Wilson*, *supra*, that private armed ships of war duly commissioned by their respective sovereigns and engaged in the most pressing and highest character of public service are under our national public policy not immune from arrest and seizure under the process of our Courts.

The foregoing decisions of our Courts and Laws of Congress make it perfectly obvious, we submit, that comity, as recognized and applied in the Courts of this country, does not require the quashing of the process issued by the District Court against the steamer *Glenseden* on any fancied ground of sovereign immunity.

POINT IV.

Certain English decisions relied upon by libellant are contrary to previous authoritative decisions of the British Courts, and are not expressive of the public policy of the United States.

Petitioner relies, it seems, chiefly on the following three recent British cases, to wit:

The Broadmayne, 1916, *f.* 64;

The Messicano, 32 T. L. R. 519;

The Erissos, Lloyd's List, 24th October, 1917, pp. 5-8.

While the first two of these cases do not enable us to judge as to what precise facts were before the British Courts, there is, nevertheless, no doubt that the third, that is, the *Erissos*, does go to the extent claimed by counsel for petitioner. That case involved a Greek vessel time chartered by her Greek owners to Messrs. Furness, Withy & Co., Ltd., on behalf of the British Government. The British government then sub-chartered her to the Italian government. While being operated by and in the possession of her Greek owners, she was arrested for the recovery of salvage compensation for services rendered to her when in a position of peril. Counsel representing the owners and the Italian government moved for the quashing of the process on the ground that the vessel was either owned by the Government of Italy, or requisitioned either by the British government or by the Italian government. On the argument it was admitted that no requisition by England or Italy could be made out for a Greek steamship, and the case finally nar-

rowed down simply to that of a private Greek steamer time chartered to the British Government, and then in turn sub-chartered to the Italian government, and used for public purposes. The Admiralty Division (Mr. Justice Hill) on these facts being shown, stayed the action as against the ship for such period of time as she should remain under charter to the Italian government for public or state purposes.

The court very frankly put its decision in the *Broadmayne* on the ground that any vessel owned by an individual, when chartered to a sovereign and engaged in performing public services for the sovereign, is not subject to arrest at the instance of private ~~owners~~^{owners}, though remaining wholly under the possession, control and navigation of the private owners. The court considered that such was the effect of the *Broadmayne*, *supra*, stripping it of any obscurity that might result from the use of the term "requisitioned" in the decision of that case. The report of the case is very interesting in showing the extent to which British courts conceive that the public policy of their sovereign requires the immunity of private owned and possessed vessels time chartered to the crown for the performance of such public service.

"His Lordship said he did not understand in any ordinary sense a requisition by the English government of a Greek ship, but perhaps it did not matter if the ship was in the public service of the British Government.

"Mr. Balloch said the question was whether the property was devoted to the public use.

"His Lordship: Do you say that any ship which is held by the English, or any friendly sovereign state, is immune from the process of this court *in rem*?

"Mr. Balloch: Yes.

"His Lordship: Nearly all ships are now in that position. * * *

"His Lordship said he did not think it was necessary to decide in general the question about what constituted a requisitioned ship. The question was whether this ship (the *Erissos*) was to be regarded as a public ship devoted to the public uses of the British Government or of the Italian government" * * *

That Mr. Justice Hill did not consider that he was going any further than the Court of Appeals had gone in the case of *The Broadmayne* is quite obvious from his opinion:

"Now, the *Broadmayne* shows that the immunity which attaches to a ship which belongs to a sovereign government for State purposes, attaches no less to a ship *which they have under charter*, but of which they are not the owners. Therefore, if it be the fact that this ship is in the service of the Italian government for state purposes, and equally if she were in the service of the British Government for State purposes, though the writ is good against the ship, the ship is exempt from any process of arrest.

"I did not think it is necessary for the purposes of this case to decide what was the nature of the requisition spoken of in the affidavit, because, at any rate, you have this upon the affidavit:

"That the ship was chartered from the Greek owners by Messrs. Furness Withy & Co., Ltd. on behalf of the British Government, and was placed by the British Government at the disposal of and for the use of the Italian government, and is being used by the Italian government for State purposes. In those circumstances, so long as they are used by either government continuously for state purposes, so long is the

ship immune from arrest, and nothing can be done by this court which infringes upon the sovereign right of either government to use the ship'."

This is a remarkable doctrine, but is precisely what, in effect if not in name, the counsel for the petitioner are contending for in this case. It would sweep away and substitute for, the doctrine established by the long line of decisions of this and other courts of the United States, as set forth and discussed in Point II, subdivision B of this brief, *supra*, a principle of public policy wholly foreign to our jurisprudence and never sanctioned for one instant in any of our courts, save in the sole instance of the *Roseric*, *supra*, decided by Judge Rellstab in the District Court for New Jersey. It is submitted that such a startling doctrine, even if now accepted as truly indicative of present British public policy, can have no effect whatsoever upon the well defined public policy of the United States. That a British court should be willing to go so far is explained, doubtless, on the theory of the wide and essential differences between the American and English governments in respect to the source and depositories of power, as fully discussed and set forth in *United States v. Lee*, 106 U. S. 196, and for this reason, as this court through Mr. Justice Harlan stated in the case of *Tindall v. Wesley*, 167 U. S. 204, 214,

"The decisions of the English courts on this subject were (are) entitled to but little weight".

But it is not conceded that the three British cases cited above truly interpret British public policy. The highest court in Great Britain has not

yet passed upon the question decided in those cases, and until that court speaks as this, our highest court, has so often and so recently spoken to the opposite effect, it cannot be accepted as certain that British public policy has taken the unheard-of step of clothing the entire British mercantile fleet (all of its vessels are requisitioned by and subject to the direction of the Crown, pp. 59-60 of this brief, *infra*) with the garb of sovereignty, and relieving it from liability to innocent sufferers for the myriad maritime torts it is capable of inflicting.

The *Broadmayne* case, which was blindly followed by the lower courts in the *Messicano* and the *Erissos*, was most hastily considered in view of the importance of the question presented. A review of the cases considered by the Court of Appeals in *The Broadmayne* shows that it did not have its attention called to any of the numerous cases decided by this and other courts in this country on the question of the status of vessels time chartered to the Government, as cited *supra* in Point II, subdivision B, of this brief.

It purported to follow the decision in the *Parlement Belge*, 5 P. D. 197. But it is obvious that the *Parlement Belge* was no authority for the remarkable step taken in *The Broadmayne*. The *Parlement Belge* and all other cases prior to the three British cases cited above, and all American cases other than the *Roseric*, *supra*, granting immunity, were cases in which the Government had undisputed possession of the vessel in question and ownership either general or *pro hac vice* as a result of actual possession.

Indeed, the *Parlement Belge* is an authority for directly the contrary of what was decided in the *Broadmayne*, the *Messicano*, and the *Erissos*. The

Court of Appeals in the *Parlement Belge* considered and approved of the *Marquis of Huntley*, 3 Hagg. Adm. 246. In that case, a ship time chartered, while carrying a cargo of naval and ordnance stores from Leith to London in November, 1884, was stranded. She was successfully pulled off by private salvors, who arrested her for salvage remuneration, and bail was furnished by the private owners. The court seemed to have no doubt as to the ship's liability to arrest, but the salvors refrained from libelling the government stores. The Court of Appeals in the *Parlement Belge* considered that the *Marquis of Huntley* had decided the point that a vessel time chartered to the Government was subject to seizure for salvage, and as an authority on that point, it was approved:

The Court of Appeals said that "the *Marquis of Huntley* was a case in which Sir John Nicholl treated the government stores, in charge of a lieutenant, but on board a ship which was only chartered by the Government, as beyond his jurisdiction, though the ship and freight were within it."

Parlement Belge, 5 P. D. 197, 212.

The impolicy of granting immunity to requisitioned or government chartered ships of the type of the *Gleneden* may be readily imagined when one considers the statement of Earl Curzon as reported in the report of the Committee of Commerce that accompanied its recommendation of the Ship Purchase Bill, Senate Report No. 689:

"The Government (British) is now administering the whole British Mercantile Marine, amounting to half the gross tonnage of the world. Forty-three per cent. of the British tonnage has been requisitioned for naval and military purposes, fourteen per cent. is occu-

pied in carrying foodstuffs and raw material in behalf of the Government and its Allies, and the remaining forty-three per cent. is being operated by British ship-owners under state regulations."

POINT V.

The use of the term requisition must not be allowed to obscure the situation as it otherwise exists.

This term is commonly accepted in a context such as that in which it is here used as meaning only a formal request or requirement. The dictionaries and encyclopedias so define it.

Requisition—"A demand in writing or formal request or requirement"

—Black's Law Dictionary, 2nd ed. (1910).

Requisition—"An authoritative demand or official request for a supply of necessities, as for a military or naval force"

—Century Dict. and Encey.

Requisition—"Act of requiring or demanding as of right; a demand or application made as by authority"

—Webster's New Int. Dict.

The meaning of the term "requisition", as used in a statute enabling the President of the United States to requisition State militia troops, has been defined to connote nothing more than a "request" as distinguished from an "order". *Mills v. Martin*, 19 Johns. (N. Y.) 726-7.

"Another ground on which to question the jurisdiction of the court-martial in this case rests on the distinction between an 'order' by the President, calling forth the militia,

which, according to the act of Congress (28th of Feb. 1795) 'may be issued for that purpose to such officer or officers of the militia as he shall think proper', and a *requisition* directed to the Governor of the State, requiring a quota or a detachment of militia to be furnished or held in readiness for the service of the *United States*. The first is a *mandatory act* of the President, as Commander-in-Chief of the militia of the United States; the latter may more properly be regarded as a *request* from the Chief Executive Magistrate of the United States addressed to the Executive Officer representing State sovereignty. A sudden emergency might demand the summary mode of a military order, addressed to a mere *militia officer*, for the detachment wanted; but ordinarily, the President has adopted the more courteous and convenient mode of *requisition*; that is, *requesting* the governor of a state to organize a portion of the militia, to be held in readiness or to rendezvous, for the service of the *United States*."

Mills v. Martin, 19 Johns. (N. Y.) 7, 26-27.

The same distinction was pointed out by this Court in the case of *Houston v. Moore*, *supra*, 5 Wheat. 1

The emergency act of June 15, 1917, authorizing the President to requisition ships, clearly indicates that, as used in that statute, the term "requisition" meant nothing more than formally to request or require. The statute authorizes him to "requisition and take over". This use of the two terms would seem to indicate clearly that it was the purpose of Congress that the President should, in the first place, formally require such ships as were needed on such terms as might be agreed upon between the government and the private owners; and that if the private owners refused to come to any such agreement, the President might then take over bodily

physical possession of the vessels (Act of June 15, 1917, c. 29, sec. 1; sec. 3115 1/16 d. Comp. St.).

The British Requisition Proclamation, as referred to in the case of *The Broadwagner*, employs almost identically the same language; that is, "to requisition and take up".

The two acts would seem to require the same construction as to the meaning of the term "requisition", and it is a matter of common knowledge that in the practical construction of the act the United States has proceeded as above indicated. It has regularly notified the private ship owner in the first instance that his vessel was required to render service to the government, and then, he being willing, a charter party has been mutually agreed upon between them. See the requisition charter, *Ret. 29*.

The British Requisition Proclamation has been given a practical construction by the British Government of the same kind as is indicated by the charter party for requisition appearing at page 16 of the Return. *The Broadwagner* 1901 P. 62 73

The Emergency Act of June 15, 1917, furthermore makes it perfectly clear that "requisition" as used in that statute does not connote the taking of possession by the government. Subdivision E of that act, c. 29, sec. 1 (3115 1/16d Comp. St.) gives the President power:

"To purchase, requisition, or take over the title to or the possession of, for use or operation by the United States, any ship so constructed or in the process of construction, or hereafter constructed, or any part thereof, or charter of such ship".

It requires no argument to elucidate the proposition that the four terms used in this section of the statute, "purchase", "requisition", "take over

the title of", and "(take over) the possession of", are used in an alternative sense. This language makes it plain, it is submitted, that requisition, as used in this and similar statutes, does not mean a taking over of the title or a taking over of possession, but simply the formal requirement by the Government of the services of a privately owned steamer while it is going to be operated by, and to be in the possession of, the private owner; a construction that is wholly consistent with the definitions that have been given as above shown by the standard dictionaries, the decisions of our courts, and the practical construction and operation of the requisition statutes and acts of both the United States and the British governments.

CONCLUSION.

The petition for the writ of ^{prohibition} **probation** and mandamus should be denied, with costs.

Respectfully submitted,

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- DEC 18 1918

JAMES D. WALKER

18
No. 18

Supreme Court of the United States

IN THE MATTER

OF

The Petition of JAMES THOMSON MUIR, Master of the British
Admiralty Transport *Gleneden*, for Writs of Prohibition and
Mandamus

against

Honorable THOMAS I. CHATFIELD, United States District Judge
for the Eastern District of New York.

SUGGESTION OF BRITISH EMBASSY AND
MOTION FOR LEAVE TO FILE

FREDERIC R. CHUBERT,
HOWARD THAYER KINGSBURY,
Counsel for British Embassy,
British Consul,
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Supreme Court of the United States.

IN THE MATTER

OF

The Petition of JAMES THOMSON
MURK, Master of the British
Admiralty Transport *Gleneden*,
for Writs of Prohibition
and *Mandamus*,

Motion.

AGAINST

HONORABLE THOMAS L. CHATFIELD,
United States District Judge
for the Eastern District of New
York.

Now come Frederic R. Conbert and Howard Thayer Kingsbury, counsel for the British Embassy in the United States of America, and pray leave of Court to intervene in the above entitled cause as *amici curiae*, and as such *amici curiae* to present to the Court the accompanying Suggestion of the immunity from judicial process of the British Admiralty Transport *Gleneden*, and upon the hearing of this cause to submit a brief in support of said Suggestion and take part in the oral argument of the cause.

DATED, DECEMBER 12TH, 1918.

FREDERIC R. CONBERT,
HOWARD THAYER KINGSBURY,
Counsel for British Embassy,
Amici Curiae,
No. 2 Rector Street,
New York City.

Supreme Court of the United States.

IN THE MATTER

OF

The Petition of JAMES THOMSON
MUIR, Master of the British
Admiralty Transport *Glen-
eden*, for Writs of Prohibition
and Mandamus,

AGAINST

HONORABLE THOMAS I. CHATFIELD,
United States District Judge
for the Eastern District of New
York.

SUGGESTION OF BRITISH EMBASSY.

Now come Frederic R. Condert and Howard Thayer Kingsbury, counsel for the British Embassy in the United States of America, intervening as *amici curiae*, and suggest and represent to this Honorable Court:

I. That the British Admiralty Transport *Gleneden*, which has been arrested under process of the United States District Court for the Eastern District of New York, should not have been arrested and should not be detained thereunder, because the said Steamship is an Admiralty Trans-

port in the service of the British Government by virtue of a requisition from the Lords Commissioners of the Admiralty, and is engaged in the business of the British Government, and under its exclusive direction and control, and is under orders from the British Admiralty to sail from the Port of New York forthwith to carry a cargo of wheat belonging and consigned to the British Government, and is not subject to judicial process from the Courts of the United States.

II. That the interruption and delay of the voyage of said vessel by such arrest and detention interfere with the British Government's possession and control of said vessel, and with the Government business upon which said vessel is engaged, and thereby interfere with the efficient conduct of the operations incident to the victorious conclusion of the present war.

III. That said United States District Court for the Eastern District of New York should not have exercised jurisdiction over a vessel in the public service of a co-belligerent foreign Government.

IV. That the British Courts have refused to exercise jurisdiction over vessels in Government service, whether of the British Government or of allied Governments, in the present war, and that by comity the Courts of the United States should in like manner decline to exercise jurisdiction over vessels in the service of the British Government.

V. That the questions involved in this matter are of great importance to the British Government by reason of the large number of vessels in

the public service of the British Government which enter ports of the United States, and the important relation borne by the Government service performed by said vessels to the efficient conduct of the operations incident to the victorious conclusion of the war.

VI. That said writ of arrest against said Steamship *Gleneden* should have been and should now be quashed and dissolved, and that all proceedings to arrest or detain the said Steamship under said writ, or otherwise, should be stayed so long as said Steamship remains in the service of the British Government as aforesaid.

VII. That by a certain order made by the Honorable Thomas Ives Chatfield, United States District Judge, dated November 27th, 1918, and referred to in the Petition in this matter, the exercise of the right of the British Government to direct and control the movements of said Steamship *Gleneden* was made dependent upon the giving of security by a private corporation, not a party to the cause in which such order was made.

VIII. That such requirement of security defeats and nullifies the immunity from judicial process to which said Steamship *Gleneden* is entitled as an Admiralty Transport in the service of the British Government, and is an attempt to exercise jurisdiction over a vessel in the public service of a co-belligerent foreign Government, over which the Courts of the United States have not and should not take jurisdiction.

IX. That in order to prevent such unlawful assumption of jurisdiction over the Steamship *Gleneden*

eden as a vessel in the public service of the British Government this Court should grant the prayer of the Petition herein, and issue a writ of prohibition directed to said Honorable Thomas Ives Chatfield, United States District Judge, forbidding him to arrest or detain the said Steamship *Glenneden*, or to exact security as a condition of her release, and a writ of mandamus requiring him to release the said Steamship and to stay all proceedings to arrest or detain her so long as she remains in the service of the British Government, and such other or further writ or writs as may be necessary or convenient in the premises.

Dated, December 12th, 1918.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for British Embassy,
Amici Curiae,

No. 2 Rector Street, New York City.



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Supreme Court of the United States

OCTOBER TERM, 1918

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No.  Original

IN THE MATTER

OF

The Petition of JAMES THOMSON MUIR, Master of the British
Admiralty Transport *Gleneden*, for Writs of Prohibition and
Mandamus

against

Honorable THOMAS I. CHATFIELD, United States District Judge
for the Eastern District of New York, and the other Judges and
Officers of said Court.

BRIEF IN SUPPORT OF SUGGESTION OF BRITISH EMBASSY

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for BRITISH EMBASSY,
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Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 28, ORIGINAL.

IN THE MATTER

OF

THE PETITION OF JAMES THOMSON MUIR, MASTER OF THE BRITISH ADMIRALTY TRANSPORT GLANCEM FOR WRITS OF PROHIBITION AND MANDAMUS

AGAINST

HONORABLE THOMAS L. CHATFIELD,
UNITED STATES DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF
NEW YORK, AND THE OTHER
JUDGES AND OFFICERS OF SAID
COURT.

Brief in Support of Suggestion of British Embassy.

STATEMENT OF FACTS.

The facts out of which this proceeding arises fully appear from the Petition of the Master of

the *Glenceden* and the papers annexed thereto. They may be summarized as follows:

An Admiralty suit *in rem* was brought in the United States District Court for the Eastern District of New York by an Italian corporation against the *Glenceden*, to recover damages for a collision which occurred in the Gulf of Lyons (Pet. p. 3, Sched. A, pp. 9-10). Process was issued and the vessel was arrested thereunder (Pet. p. 3, Sched. C, pp. 17-18). The *Glenceden* is a British vessel, belonging to a private owner, but requisitioned by the British Government, and employed in its public service as an Admiralty Transport. She was loaded with a cargo of grain belonging and consigned to the British Government and was under Admiralty orders to sail forthwith. Under instructions from the British Embassy, its counsel intervened in the Admiralty suit by leave of Court as *amici curiæ* and presented a Suggestion that the *Glenceden* was immune from judicial process as a vessel in the public service of the British Government and should be released from arrest and permitted to perform her Government service without further interference (Sched. E, pp. 22-24). The matter came on for hearing before Judge Chatfield, upon the return of an Order to Show Cause (Sched. E, pp. 20-21). After extended argument, he handed down an opinion on November 27th, 1918, in which he said that

"the Court will not retain possession of the
 "boat unless that possession can be acquired
 "without interfering with the rights of the
 "British Government" (Sched. I, p. 4.).

but nevertheless required, as a condition of turning the vessel over to the representatives of the

British Government, that a bond be given by the private owner, although the private owner had not become a party to the cause and was not before the Court (Sched. I., p. 48, Sched. M., p. 51). As recited in Judge Chatfield's order, a representative of the firm of Kirlin, Woodsey & Hicks, who appeared as Proctors for the owner of the *Glenneden* in an Admiralty suit in another District, was physically present in Court pursuant to an "order of Court" to that effect (Sched. M., p. 51), but there was no warrant in law for this extraordinary procedure, nor could it be effective to confer jurisdiction *in personam* over the owner.

It was considered that Judge Chatfield's order was without jurisdiction in two aspects: it was an interference with an instrumentality of a co-belligerent foreign Government, and an attempt thereby to bring pressure to bear upon a party not before the Court to compel the giving of security for a private claim. Nevertheless, the Court's order could not have been ignored without the possibility of an unseemly conflict with the actual custody of the Marshal over the vessel, incompatible with the courtesy which the British Government wishes to show to the Courts of the United States.

Counsel for the British Embassy, being in the case as *amici curiae* only, could take no further steps by way of appeal. It has not been the practice for the Embassy to come into Court as a party, or intervene in litigation except for the purpose of informing the Court of official facts of which the Court may take judicial notice and upon which it may then act in conformity with the principles of international law. If a bond had

been given by the owner as required by Judge Chatfield's order, the question of immunity would have become academic, since the vessel would thus have been no longer under restraint or subject to or threatened with arrest.

The only recourse is thus to a Court exercising supervisory power over the District Court to prevent it from exceeding its jurisdiction. Upon the theory that the general appellate power, which the Circuit Court of Appeals exercises in Admiralty over the District Court, was sufficient to authorize it to issue a writ of prohibition or mandamus to the District Court in this case, a petition by the Master, similar to the Petition at bar, was presented to the Circuit Court of Appeals for the Second Circuit, which was then in session. Counsel for the British Embassy again intervened by leave of Court as *amici curiae* and presented a Suggestion of immunity similar to that presented in the District Court. The matter was argued on December 6th, 1918, and decided on the following day. The Court held that Judge Chatfield's order did not defeat the appellate jurisdiction of the Circuit Court of Appeals, and that therefore that Court had no power to interfere by prohibition or mandamus, since it could grant such writs, under §262 of the Judicial Code, only in aid of its appellate jurisdiction.

It accordingly declined to enquire whether Judge Chatfield's order was right or wrong and referred to §234 of the Judicial Code, empowering the Supreme Court to issue writs of prohibition to the District Courts when proceeding as courts of admiralty or maritime jurisdiction.

The present proceeding was then brought in this Court by the Master of the *Gleneden*, and counsel

for the British Embassy, again intervening as *amici curiae*, by leave of this Court granted on December 16, 1918, once more suggest the immunity of the vessel from judicial process and pray for appropriate action by this Court to assure such immunity. For the convenience of the court a copy of the Suggestion is appended to this brief (*infra*, p. 37).

On the same day on which the Petition was verified, arrangements were made whereby the vessel was permitted to proceed on her voyage, but without thereby quashing or withdrawing the writ of arrest (Pet. p. 6, Sched. P. p. 57). This follows a course of procedure established and approved in the *Roseric* case, to which further reference will be made in this Brief (*infra*, pp. 15, 16, 41).

This Brief has necessarily been prepared in advance of the submission of Judge Chatfield's Return to the Rule to Show Cause, and upon the assumption that such Return will not depart materially from the Return filed by him in the Circuit Court of Appeals. Application will be made hereafter for leave to file a Brief in Reply, if this should appear necessary when Judge Chatfield's Return is filed in this Court.

Brief of the Argument.

I. As an Admiralty Transport, in the public service of the British Government, the *Gleneden* is immune from judicial process.

II. The immunity from judicial process of requisitioned vessels in the public service of a belligerent government is supported by every consideration of public policy and of comity.

III. The public importance of the question is not affected by the armistice.

IV. The Suggestion of immunity by counsel for the British Embassy is a proper method of procedure, and is conclusive as to the official facts thus stated.

V. This Court has power to grant appropriate relief in this proceeding, and such relief is necessary to meet the situation.

POINT I.

As an Admiralty transport, in the public service of the British Government, the *Gleneden* is immune from judicial process.

The immunity from judicial process of vessels in the public service of a friendly foreign nation has been firmly established as a rule of international law recognized by the Courts of this country since the decision by this Court in 1812 of the leading case of *The Exchange*, 7 Cranch 116.

The facts in that case were such that the Court's sympathies must have been in conflict with its conclusions.

“The American Schooner *Exchange*, having
 “been captured and confiscated by the French
 “under the Rambouillet decree, which decree
 “both the Executive and the Congress of the
 “United States had declared to constitute a
 “violation of the law of nations, was converted
 “by the French Government into a man of

“war, and commissioned under the name of
 “the *Balaou*. In this character the vessel
 “came into a port of the United States, where
 “she was libelled by the original American
 “owners for restitution”.

(*Moore's Int. Law Digest*, Vol. 2, p. 576).

A suggestion of the national character of the vessel was made by the United States Attorney, and it was held by the District Court that she was immune from the local jurisdiction. This conclusion was reversed by the Circuit Court (4 Hall L. J. 233; 16 Fed. Cas. No. 8786), but affirmed by this Court in an exhaustive opinion by Chief Justice Marshall, which is too familiar to require extended quotation. The immunity which the Court recognized, apparently with some reluctance, was based upon the theory that such a vessel, which is

“a part of the military force of her nation;
 “acts under the immediate and direct com-
 “mand of the sovereign; *is employed by him*
 “*in national objects*” (7 Cranch p. 144);

must be supposed to enter a friendly port under an implied promise of exemption from the local jurisdiction.

It is evident from Chief Justice Marshall's opinion that he believed that the title of the Emperor of the French to the *Exchange* was of doubtful validity, but concluded that it was not open to inquiry in an American Court, and that when once the character of foreign public vessel had attached, whether rightfully or wrongfully, immunity from local jurisdiction necessarily followed. This leading case had been foreshadowed in 1781 by the decision of the Admiralty Court of Pennsylvania in *Moitez vs. The*

South Carolina, Bee, 422, 17 Fed. Cas. No. 9697, which does not, however, appear to have been referred to by either Court or counsel in *The Exchange*.

The doctrine of *The Exchange* has been developed by subsequent decisions, so that it is now the generally accepted rule, both in this country and in England, that the immunity of a public ship attaches:

1. To any vessel actually owned by and operated under the control of a sovereign, even if not for exclusively public purposes; and
2. To any vessel operated under the control of a sovereign and devoted to the public service, even if the legal ownership remains in a private individual.

The complete and absolute immunity of armed vessels of war is too well established and recognized to require discussion. Brief reference will be made to other classes of vessels to which the same rule has been applied.

- (a) Light-ships used as aids to navigation.

Briggs vs. Light-boats, 93 Mass. (11 Allen) 157.

- (b) Steam tugs belonging to a municipality and employed by it in the public service.

The Fidelity, 9 Ben. 333, 8 Fed. Cas. No. 4757; affirmed 16 Blatch. 569, 8 Fed. Cas. No. 4758.

In this case Judge (afterwards Mr. Justice) Blatchford in the District Court sustained the claim of immunity from seizure in admiralty because

“such action has the effect of interfering with
 “the public officers in the discharge of their
 “public duties, by depriving them of neces-
 “sary instruments for the discharge of those
 “duties”;

and Chief Justice Waite in the Circuit Court
 pithily put it that

“if the instruments of government cannot be
 “seized to pay a debt after judgment, they
 “cannot before.”

To the same effect is

The John McCracken, 145 Fed. 705.

(c) Army transports or troop ships.

The Thomas A. Scott, 10 Law Times Rep.
 (N. S.) 726, (apparently not included
 in any American report).

The Athol, 1 Wm. Rob. 374.

This rule has also been applied by the British
 port authorities in favor of a British vessel char-
 tered to the United States and “employed as a
 transport in the military service”.

The Tartar, Moore’s Int. Law Dig. Vol.
 2, p. 577.

(d) Naval vessels carrying private property
 home from an Exposition.

The Constitution, L. R. 4 Prob. Div. 39.

(e) Mail packets belonging to foreign govern-
 ments, although carrying private passengers and
 commercial cargo.

The Parlement Belge, L. R. 5 P. D. 197,
 reversing L. R. 4 P. D. 129.

This is the leading English case on the general subject. It is to a great extent founded on the decision of this Court in *The Exchange* (*supra*).

The Court of Appeal by Brett, L. J., announced, as a "correct exposition of the law of nations" (p. 217):

"That as a consequence of the absolute independence of every sovereign authority and
 "of the international comity which induces
 "every sovereign state to respect the independence of every other sovereign state,
 "each and every one declines to exercise by
 "means of any of its courts, any of its territorial jurisdiction over the person of any
 "sovereign or ambassador of any other state,
 "or over the public property of any state
 "which is destined to its public use, or over
 "the property of any ambassador, though
 "such sovereign, ambassador or property be
 "within its territory, and therefore, but for
 "the common agreement, subject to its jurisdiction."

The argument that immunity should be limited to vessels of war was met thus (pp. 219, 220):

"But it is said that the immunity is lost by
 "reason of the ship having been used for
 "trading purposes. As to this, it must be
 "maintained either that the ship has been so
 "used as to have been employed substantially
 "ly as a mere trading ship and not substantially for national purposes, or that a use
 "of her in part for trading purposes takes
 "away the immunity, although she is in possession of the sovereign authority by the
 "hands of commissioned officers, and is substantially in use for national purposes.
 "Both these propositions raise the question
 "of how the ship must be considered to have
 "been employed."

"As to the first, the ship has been by the
 "sovereign of Belgium, by the usual means,
 "declared to be in his possession as sover-
 "eign, and to be a public vessel of the state.
 "It seems very difficult to say that any Court
 "can inquire by contentious testimony
 "whether that declaration is or is not cor-
 "rect. *To submit to such an inquiry before*
 "*the Court is to submit to its jurisdiction.*
 "It has been held that if the ship be declared
 "by the sovereign authority by the usual
 "means to be a ship of war that declaration
 "cannot be inquired into. That was express-
 "ly decided under very trying circumstances
 "in the case of *The Exchange*. Whether the
 "ship is a public ship used for national pur-
 "poses seems to come within the same rule."

See also *The Jassy*, 1906, Prob. 270.

(f) Vessels belonging to a foreign government,
 chartered to a private individual for commercial
 business, but commanded by a naval officer.

The Maipo, 252 Fed. 627.

(g) Railway ferry-boats belonging to a Co-
 lonial Government and used in operation of a gov-
 ernment railway.

Young vs. SS. Scotia, 1903, A. C. 501
 (Privy Council).

(h) Requisitioned vessels belonging to private
 owners, but operating under government control
 in the public service.

The Broadmayne, 1916, Prob. 64.
The Messicano, 32 Times Law Rep. 519.
The Erissos, Lloyd's List, Oct. 24, 1917.
The Crimdon, Lloyd's List, Nov. 6, 1918,
 35 Times Law Rep. 81.
The Roseric, N. Y. Law Journal, Dec. 13,
 1918.

It is to this last class of cases that the cause at bar belongs and they therefore call for special attention. They may be deemed to represent the contribution of the present war to the jurisprudence of this particular subject.

At an early stage of the great conflict it became apparent that ocean transportation, not only of troops and munitions of war, but of everything used by the belligerent nations, was an absolutely essential factor of military success. Both belligerent and neutral shipping was suffering from the effects of the piratical submarine campaign of the common enemy. Every available bottom was urgently needed. Freight and charter rates were becoming prohibitive. Only the strong hand of governmental war powers could cope with the situation. A system of requisitioning ships accordingly became necessary and was adopted. In many, if not in most, cases, the requisition was directed not to the full ownership of the vessels taken, which would have involved an enormous increase in the necessary expense, but only to their use, which was sufficient to meet the necessities of the belligerent Governments.

The British Courts were soon called upon to consider the status of these requisitioned vessels and determine whether they were liable to or immune from arrest under admiralty process. It was contended, in the case of a ship requisitioned on a time charter basis, and employed in carrying oil for the navy,

"that the effect of requisitioning a ship is not
"to change the ownership, and the ship re-
"quisitioned remains the property of the own-
"ers notwithstanding the requisitioning,"

and that therefore the ship should be treated as a private vessel for the purpose of subjection to admiralty process to enforce claims against her or her owners. The English Court of Appeal held, however, in the leading case of *The Broadmayne*, 1916, Prob. 64, that the residual proprietary interest of the owners of a requisitioned vessel

"does not prevent a ship, so long as she remains under requisition, being in the service of the Crown, and as such exempt from process of arrest (p. 70),

and laid down the broad general rule as follows:

"It is clear that a ship which is requisitioned by the Crown is as free from arrest as a King's ship of war would be and the exemption extends as well to claims of salvage as to claims of collision or other claim" (p. 69).

The Court accordingly ordered

"that all further proceedings in this action with a view to the arrest or detention of the ship be stayed for so long as the ship shall remain under requisition in the service of the Crown" (p. 72).

The same rule was applied in *The Messicano*, 32 Times L. R. 519, in favor of a vessel requisitioned by and in the service of the Italian Government, and the Court held:

"that a similar privilege against arrest by British plaintiffs enures for a requisitioned ship of an ally as for a ship requisitioned by this country";

Also in *The Erissos*, Lloyd's List, Oct. 24, 1917, in favor of a vessel chartered from Greek owners by a British firm on behalf of the British Govern-

ment, and placed by it at the disposal of the Italian Government.

The most recent instance to come to public attention is of peculiar interest here. That is the case of *The Crimdon*, Lloyd's List, November 6, 1918; 35 Times L. R. 81. There it appeared by letters from the Secretary of the United States Shipping Board Emergency Fleet Corporation, and the American Shipping Mission, that the *Crimdon*, a Swedish steamship, was

"under time charter to the United States
"Shipping Board Emergency Fleet Corpora-
"tion * * * and was being employed in
"Army transport service".

and her immunity from arrest was claimed both by the Secretary of the Emergency Fleet Corporation and by the Shipping Mission.

The Court held that this was a sufficient claim of immunity by the United States, and that

"the State which has the vessel in use for pub-
"lic purposes can claim to have the vessel re-
"leased from the arrest of the Court, and the
"method by which the vessel has been put in
"the service of the State is immaterial. *She*
"may be in the service of the State by requis-
"tion without a written agreement; she may
"be in the service of the State by charter-
"party, but how she has come into the service
"of the State is, in my view, immaterial, so
"long as she is at the time being used by the
"State for public purposes. Nor, to my mind
"is it material whether the flag of the vessel
"is the flag of the State applying to the Court,
"or the flag of any other country, nor whether
"the vessel is one over which the State ap-
"plying to the Court can exercise compulsory
"powers of requisition or not."

Surely a Court of the United States should treat a British transport with the same consideration with which the British Court has treated an American transport similarly situated. In one case this has been done, namely, *The Roseric*, decided by the District Court for the District of New Jersey on November 22nd, 1918. As this is the only case in the lower Courts, other than the case at bar, in which this question has been squarely decided since the United States became a co-belligerent, and as the opinion of Judge Rellstab contains an admirable and exhaustive discussion of the entire subject, but has not yet been reported except in the New York Law Journal, it is printed in full for the convenience of the Court as an appendix to this Brief (*infra*, pp. 41-59). The facts were substantially identical with those in the case at bar. The *Roseric* was a British Admiralty Transport in the service of the British Government under requisition. She was sued *in rem* for collision damages. An arrangement was made for the giving of security if she should be held not immune and she was allowed to proceed on her voyage, but still subject to arrest. Counsel for the British Embassy intervened by leave of Court as *amici curiae*, and presented a Suggestion of immunity. The Court sustained the claim of immunity, placing its decision upon the broad ground that:

"The British Government, in the exercise
 "of its sovereign powers, took the *Roseric*
 "and devoted it to its own purposes. That
 "no change in the officers and crew took
 "place and that they continued in the em-
 "ployment of the ship's owner is unimpor-
 "tant. The ship, its owner, officers and crew
 "were under the compulsion of sovereignty.

“While the fact that the operation of the ship was by the owner’s officers and crew may be important on the question of the owner’s present and the ship’s ultimate liability for the negligence charged in the libel, it is immaterial upon the question of the right of a private individual to enforce such liability by seizing the ship while it remains appropriated to the sovereign’s public use. Whether the Government should operate the ship by the owner’s officers and crew or otherwise was for the sovereign’s exclusive determination.

“The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being, became the sovereign’s instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign’s possession while the requisition was in force.

“In legal effect a ship so subjected to *vis major* is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy.”

The Court followed the procedure indicated in the *Broadmagne* case, and stayed all proceedings to arrest or detain the *Roseric* so long as she should remain in the service of the British Government.

This decision was announced while the case at bar was before Judge Chatfield. It was immediately brought to his attention and he expressed his concurrence by saying that it “bears out the conclusion of this Court” (Sched. L, p. 47).

It is difficult, if not impossible, to reconcile this with the requirement of security as a condition

of release (p. 48). Judge Chatfield recognized that the *Gleneden* was

“a public vessel of the British Government
 “* * * in the sense that her use by that
 “Government should not be unduly interfered
 “with” (p. 46).

Clearly, any interference which prevents her from performing her public functions is “*undue*”. He also recognized that the intervention by counsel for the British Embassy was proper and that the rights of the British Government could not be litigated (p. 45). But in spite of all this, he subordinated these indisputable rights to the private claim of the libellants against the private owner, and interrupted the voyage of this Government transport, laden with food supplies belonging to the British Government and destined to the relief of starving Europe, in order to provide security for this private claim.

He appears to have been somewhat influenced by the decision of the Circuit Court of Appeals (3rd Circuit) in *The Attualita*, 238 Fed. 909.

That case, however, was considered and distinguished in the *Roseric* case on the ground that it was decided before this country became a co-belligerent. This is a most material difference. In the *Attualita* case there was no demand by the Italian Government for the release of the vessel as an Admiralty transport or naval auxiliary, but merely a representation by the United States attorney of the fact of a requisition by the Italian Government, “for such consideration as the Court may deem necessary and proper,” coupled with an express disclaimer that the United States was intervening as an interested party, or that the United States attorney was appearing “either for the United States or for the Italian Government.” The claim of immunity was made only by

the master in the interest of the owner. It may be that the Italian Government felt some apprehension that, if the *Attualita* were claimed as a transport or fleet auxiliary, she might be regarded as belonging to a class of vessels which had been held subject to internment in such cases as *The Tuscaloosa* (Geneva Award, Molloy's Treaties, Vol. 1, p. 721), and *The Farn* (State Dept. Dipl. Corresp. European War No. 2, pp. 139, 140), and accordingly hesitated to make such a claim while this country was neutral.

This Court has very recently held that the change in international relations caused by this nation becoming a co-belligerent instead of a neutral alters the relation of the Court to cases having an international aspect.

See *Watts, Watts & Co., vs. Unione Austriaca, etc.*, decided October 14, 1918.

The Luigi, 230 Fed. 493, was also decided while this country was neutral and no official representations were made therein until after the vessel had been released upon a bond voluntarily given by her private owners.

There is another class of cases, also satisfactorily distinguished by Judge Reelstab, in which property belonging to a Government has nevertheless been subjected to a lien for salvage or general average when such lien could be enforced without disturbing the possession and control of Government representatives.

To this class belong

The Siren, 7 Wall. 152.

The Davis, 10 Wall. 15.

Long vs. The Tampico, 16 Fed. 491.

United States vs. Wilder, 3 Sumner, 308.

The Johnson Lighterage Co. No. 24, 231 Fed. 365.

The test applied in these cases is whether the private lien can be asserted without interfering with the actual employment of the property in the public service. As expressed by Judge Blatchford in *The Fidelity*, 8 Fed. Cas., No. 4757, for public property to be immune from process, "it must be devoted to the public use and must be employed in carrying on the operations of the Government".

Other cases, however, lay down the broader principle that property belonging to a sovereign Government is absolutely immune from local jurisdiction, irrespective of its immediate physical possession,

Hassard vs. United States of Mexico, 29
Misc. 511; 46 App. Div. 632; 173 N. Y.
645.

Varasseur vs. Krupp, L. R. 9 Ch. D. 351,
and see *Moore's Int. Law Digest*, Vol.
2, pp. 591-593.

It may be noted in passing that this rule does not apply where the sovereign consents to be sued (*United States vs. Morgan*, 99 Fed. 570), or to an uncondemned prize brought into a neutral port in violation of neutrality (*The Steamship Appam*, 243 U. S. 124).

Brief reference may also be made to certain other decisions which may be invoked in opposition to the suggestion of the British Embassy.

The Charkieh, L. R. 8 Q. B. 197, and L.
R. 4 Adm. & Eccl. 59.

Here immunity was refused to a vessel belonging to the Khedive of Egypt; first, because she was

not employed in public and governmental service, and second, because the Khedive was held not to be an independent sovereign, but merely an hereditary provincial Governor. This decision was fully discussed in *The Parlement Belge* (*supra*).

The Oyster Police Steamers of Maryland,
31 Fed. 763.

Here vessels belonging to the State of Maryland and employed by it in the supervision of the oyster industry were held not exempt from seizure by the United States for violation of federal inspection statutes, because it was held that the federal sovereignty was supreme in this field (and see *South Carolina vs. United States*, 199 U. S. 437).

Workman vs. New York City, 179 U. S. 552.

This dealt with the personal liability of a municipal corporation for damages done by a boat belonging to it. No attempt had been made to levy process against the boat.

The Florence H., 248 Fed. 1012.

This case was decided upon the express ground that the Act of Congress of September 7, 1916 (39 Stat. 728, 730), relating to ships chartered from the United States Shipping Board, prescribes that

"Such vessels while employed solely as
"merchant vessels shall be subject to all laws,
"regulations and liabilities governing mer-
"chant vessels, whether the United States be
"interested therein as owner, in whole or in
"part, or hold any mortgage, lien or other
"interest therein."

In other words, it is the policy of this country that the liabilities of such vessels depend upon their use and employment, and not upon the extent of the interest vested in the Government. It is not necessary to decide in the case at bar what would be the immunity of a vessel requisitioned by a foreign government merely for the purpose of directing the movements of commercial cargoes and still employed for commercial purposes, transporting merchandise for private persons and private profit. The vessel here involved is under the complete and exclusive control of the British Government; she is wholly devoted to the public service, and is carrying government stores for government purposes; her private owners do not even know her movements (Sched. F. p. 26); and their only function is to receive compensation for her use.

The Prins Frederik, 2 Dods. 451 (1820).

This was an early English case in which the question of immunity was argued at great length by counsel but not disposed of in the opinion of the Court. It was fully considered by the Court of Appeal in *The Parlement Belge* (L. R. 5 P. D. at p. 213), where reference was made to Lord Campbell's remarks concerning this case in *De Haber vs. The Queen of Portugal*, 17 Q. B. 171, as follows:

"And further, citing *The Prins Frederik*,
"he says:

'Objection being made that the Court
'had no jurisdiction, a distinction was at-
'tempted that the salvors were not suing
'the King of the Netherlands, and that
'being in possession of and having a lien
'upon a ship which they had saved, the
'proceeding might be considered *in rem*.

'But Lord Stowell saw such insuperable difficulties in judicially assessing the amount of salvage, the payment of which was to be enforced by sale, that he caused representation to be made to the Dutch Government, who very honourably consented to his disposing of the matter as 'an arbitrator.' ''

The Swallow, Swab. 30.

The Inflexible, Swab. 32.

These were personal suits against the commanders of Government vessels. They were defended by the Government without in any way raising the question of immunity, and there was no process against the vessels.

There is a striking consensus of judicial opinion both in this country and in England upon the proposition that where a vessel is in the actual public service of a foreign sovereign she is exempt from local jurisdiction, not as a matter of grace at the hands of a particular Court, but by virtue of an accepted principle of international law, and the further proposition that the right of a foreign Government to the unhampered use of its instrumentalities of sovereignty is not to be defeated because some residual property interest or shred of technical legal "possession" remains in a private owner, subject to paramount governmental control.

The criteria of immunity are government control and dedication to the public service, rather than ownership or technical possession. When government control intervenes, neither ownership

nor technical possession fixes liability to process, mesne or final, upon the vessel or her owners.

See *The Utopia*, 1893, A. C., 492, 499.

In this case the Privy Council referred to *The Parlement Belge* as an accepted authority, and in *The Castlegate*, 1893, A. C. 38, 52, the House of Lords also cited it with approval.

POINT II.

The immunity from judicial process of requisitioned vessels in the public service of a co-belligerent government is supported by every consideration of public policy and of comity.

The grounds of public policy, upon which the Courts have recognized and declared the immunity from process of instrumentalities of Government, are apparent. It is of vastly more importance that the machinery of governmental activities, conducted in the interest of all, should function without interference or interruption, than that a private creditor, either of the Government or of some private individual, should be able to resort to some particular remedy or special tribunal. Every civilized Government provides means by which claims against it may be presented and determined, and also tribunals in which claims against individuals within its jurisdiction may be prosecuted, without interfering with the operations of the Government

itself. These considerations apply with special force when interference with the instrumentalities of a foreign Government, temporarily within the local territorial jurisdiction, is proposed.

It is incompatible with the dignity and independence of a sovereign that he should be forced to litigate his rights in the tribunals of another sovereign and thus submit to a foreign jurisdiction. It is a pre-requisite of international intercourse that each sovereign should respect the independence of every other sovereign, and refrain from attempting to subject the person, the property or the governmental instrumentalities of any other sovereign to the jurisdiction of his Courts.

This international comity is not a matter of grace to be granted by one Court and refused by another; it is a principle which is now so firmly established as to be binding on all Courts. This has very recently been recognized by the English Courts at the request of American representatives in favor of a vessel requisitioned by this country (*The Crinodon*, *supra*, p. 14); and the Courts of this country should regard themselves as bound by the same rule as a matter of right, as well as impelled to the same conclusion by every consideration of international courtesy and reciprocity.

See The Paquete Habana, 175 U. S. 677, 694, 700.

Hilton vs. Guyot, 159 U. S. 113, 163, 165.

As pointed out in the opinion in the *Roseric* case (*infra*, at pp. 55, 56), the mutual benefit which accrues from the implied consent of sovereigns in a state of peace and amity to waive jurisdiction over the public instrumentalities of one another is immeasurably increased when they are "actively

engaged in prosecuting a war against a common enemy". Then any private inconvenience sinks into insignificance in comparison with the great national ends to be attained, and each nation is in honor bound to co-operate and not interfere with the operations of its co-belligerents.

There is nothing in this practice in any way inconsistent with any rule of public policy declared or recognized in this country. It is only when "employed solely as merchant vessels" that ships requisitioned by the United States are liable to process (*supra*, p. 20). The property of railroads taken over by the United States is exempt from seizure under legal process while so operated (*President's Proclamation of Dec. 26, 1917, Emergency Legislation, Clark's Compilation*, p. 158). Persons in the military or naval service of the United States are entitled to a stay of all civil proceedings against them or their property while so serving (*Soldiers' and Sailors' Civil Relief Act of March 8, 1918, §§200-204, 300*). The policy of this Government is thus plainly declared to be that persons and property devoted to the public service in this time of emergency shall be protected against interference by judicial process for the enforcement of private rights.

In the case at bar, the application of this rule involves no denial nor even substantial delay of justice to the libellants, whether their claim be ultimately against the vessel herself, or her owners. They may sue the owners *in personam* in the English Courts; or they may sue there *in rem* without arresting or detaining the vessel (see *The Nautik*, 1895, Prob. 121, and *The Broadmayne*, *supra*, p. 13). Moreover, the owners have already invoked the jurisdiction of the District Court for the District of New Jersey, and the libellants here

have been invited to file a cross libel there (Sched. H, p. 36).

It does not appear that the libellants assert any claim against the British Government; if they do, there is ample opportunity for its presentation, and it cannot, in any event, be adjudicated upon by an American Court. Whatever libellants' claim may be, it should not be allowed to interfere with the regular operations of the instrumentalities of the British Government engaged in bringing the war to a victorious conclusion.

POINT III.

The public importance of the question is not affected by the armistice.

It is true that hostilities have been suspended by the armistice and that the flow of sacrificial blood has been stanchcd. But a state of war still subsists and the fangs of the Beast, though broken, have not yet been wholly drawn. A new Watch on the Rhine, undreamed of in the philosophy of Potsdam, "stands fast and true" under the flags of the free nations; victors, but in an enemy country. The Armies of Occupation must still be supported, provisioned and equipped; the great problems of demobilization and repatriation must be dealt with; reconstruction must begin; the hungry millions of many lands must be fed.

For many months to come the necessities of transportation and of its effective control by the co-belligerent governments will continue unabated. Victory is won, but it is not yet crystallized into

peace; the sword is sheathed, but not yet laid aside. The time has not yet come when any of the public instrumentalities by which success was achieved should be subjected to private interference, especially as against that nation whose power upon the seas made possible America's effective participation in the victory.

In cases which arose after the Spanish war this Court held that the legal effects of a state of war continued even after a capitulation.

See *Herrera vs. United States*, 222 U. S. 558.

Diaz vs. United States, 222 U. S. 574.

How much more is this the case when there has been no capitulation, but merely an armistice subject to termination, and when the hostile army has withdrawn, but not surrendered.

POINT IV.

The suggestion of immunity by counsel for the British Embassy is a proper method of procedure, and is conclusive as to the official facts thus stated.

As this Court has by its order of December 16, 1918, expressly allowed the present intervention by counsel for the British Embassy as *amici curiae*, it cannot be necessary to argue further in support of the propriety of such procedure.

It may be remarked, however, that it is not an innovation. A similar intervention was permitted by this Court in *Dillon vs. Strathearn Steamship Company*, on April 1st, 1918, (case decided December 23, 1918). The same practice has been repeatedly followed in the lower Courts.

See *The Athanasios*, 228 Fed. 558.

The Maipo, 252 Fed. 627.

The Adriatic, N. Y. Law Journal, October 19, 1918.

The Roseric, *infra*, at p. 36.

The conclusiveness of such representations as to all facts of an official character has been frequently recognized.

See the cases above cited and also *Agency of Canadian Car & Foundry Co. Ltd. vs. American Can Co.*, 253 Fed. 152, and

Dupont vs. Pichon, 4 Dall. 321, as cited, *arguendo*, in *The Exchange*, 7 Cranch. at p. 121.

An Ambassador or Minister may cause suit to be brought in the name of his Government in the American Courts, and neither his authority nor the authority of his counsel to represent him is to be questioned.

See *Republic of Mexico vs. De Arangoiz*, 5 Duer (N. Y.) 643, 646.

Also *The Sapphire*, 11 Wall. 164, 167.

Since an Ambassador can cause suit to be brought, surely he can instruct counsel to appear as *amici curiae* for the purpose of informing the Court as to official acts and avowing them as the acts of his Government.

In *Tucker vs. Alexandroff*, 183 U. S. 424, at p. 441, this Court quoted with approval from *Hall on International Law* (Sec. 44) the expression that "attestation by a Government that a ship belongs to it is final". Here there is an attestation by a Government that a ship is in its public service, made in its name by counsel whose authority was not questioned by the District Court. Objection was offered below that the representations should have been made by the State Department, speaking through the Department of Justice. But Judge Chatfield, after considering the authorities, reached the same conclusion that Judge Kellstab had announced, that the method of making the representations was proper.

It is interesting to note that in *The Pizarro*, 19 Fed. Cas. No. 11199, 10 N. Y. Leg. Obs. 97, objection was made to the intervention of the United States Attorney and that the Court allowed such intervention, because it was "the prerogative of the United States to subrogate itself a party in the place of the nation owning the offending ship".

Here the foreign nation is asserting its own rights in a proper and usual manner.

Objection was also made in the District Court on the ground that the particulars of the requisition were not shown. These are not material. It makes no difference what compensation the owners receive for the use of the *Glenneden*, or how they receive it, or how the officers and crew, who owe obedience to the Government only, are engaged or paid. The vessel is avowed as a public ship during the period of her public service; that official declaration is not to be made the subject of contentions testimony (*The Parle-*

ment Belge, L. R. 5 P. D. 197, at p. 219), and that fact establishes her immunity.

See also *The Crimdon*, *supra*, p. 14.

The District Court recognized that "the rights of the British Government to use this boat as a requisitioned vessel should be respected" (Sched. L. p. 48). These rights are not to be ignored because there was necessarily some co-operation between counsel for the owners and counsel for the British Embassy in the presentation of the claim of immunity to the Court, nor can such co-operation furnish any basis for the exaction of security as a condition of respecting the rights of the British Government.

POINT V.

This court has power to grant appropriate relief in this proceeding and such relief is necessary to meet the situation.

By §234 of the Judicial Code:

"The Supreme Court shall have power to
 "issue writs of prohibition to the District
 "Courts when proceeding as courts of admiralty and maritime jurisdiction; and
 "writs of mandamus, in cases warranted by
 "the principles and usages of law, to any
 "Courts appointed under the authority of the
 "United States, or to persons holding office
 "under the authority of the United States,
 "where a State, or an ambassador, or other
 "public minister, or a consul or vice-consul
 "is a party."

By §262 of the Judicial Code this Court, the Circuit Courts of Appeal and the District Courts also have power:

“to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.”

Under these provisions this Court has power to afford whatever remedy may be most appropriate in the case at bar, and only by such interposition can adequate and effectual relief be obtained.

The District Court is proceeding as a “court of admiralty and maritime jurisdiction”, and is undertaking to exercise such jurisdiction over a *res* entitled to immunity, although it has expressly recognized that the *res* belongs to the category of vessels in the public service, which, under the principles of international law, are exempt from local jurisdiction. This is not a case in which the District Court has made an erroneous decision upon a question of fact on which its jurisdiction depends; or has exercised its discretion in a matter in which it has discretionary power; it is a case in which the District Court has disregarded a clear right of immunity from its process arising out of the facts as it found them to be, and has made the British Government’s right to enjoy the benefit of this immunity dependent upon the giving of security by a private person not a party to the cause.

The case is thus a proper one for the exercise by this Court of its power of prohibition. This power has very recently been exercised in a case in which the “District Court attempted to exceed its jurisdiction”, by allowing the joinder of new

libellants having separate claims against the defendant, in an admiralty suit *in personam*, who had appeared in response to the citation in the suit as originally brought.

See *Ex parte Indiana Transportation Co.*,
244 U. S. 456.

In the case at bar the District Court has "attempted to exceed its jurisdiction" by allowing its process to be levied and maintained upon a *res* not subject thereto. It makes no difference whether the attempted excess of jurisdiction is *in personam* or *in rem*; in either case it may be prevented by prohibition.

There is also a very early and singularly apposite precedent for such relief in such a case.

See *United States vs. Peters*, 3 Dall. 121
(1795).

Here the District Court had taken jurisdiction of a libel against a French armed corvette and her Commanding Officer for damages for the alleged illegal seizure on the high seas of an American vessel. It was also claimed that the French vessel had been illegally armed and equipped in an American port. The Commanding Officer presented to this Court a Suggestion for a writ of prohibition, supported by a certificate from the French Minister, a procedure substantially identical with that followed in the case at bar. The power of this Court to grant the writ, the appropriateness of the remedy, and the immunity of the French vessel and her Commander were elaborately argued by eminent counsel and the writ was granted without opinion.

In view of these two perfect precedents it is unnecessary to discuss the numerous other cases

in which this Court has passed upon other aspects of its power and procedure in respect to writs of prohibition. It is immaterial that in the case at bar the District Court, on the face of the libel, had jurisdiction of the suit and that the right of immunity did not appear from the libel itself. The facts upon which the immunity is based were properly and promptly brought before the District Court and were recognized by that Court to have been sufficiently established.

The case was not one within the discretionary power of the District Court. A Court has no discretion to levy process upon a *res* immune from such process, whether by statute, by treaty, or by international or common law; or to exact security for the release of a *res* so immune, any more than it would have discretion to hold an Ambassador to bail. The facts upon which the immunity depends having been presented and recognized, the Court was bound to regard itself as divested of jurisdiction to proceed against the *res*. Having undertaken to proceed, it should be prevented by prohibition.

No other remedy is available, adequate or effectual. The owners had not, and have not, made themselves parties to the suit. The "Special Claim and Exceptions" of the Master were not filed until after Judge Chatfield's decision on the question of release (Pet., p. 5). Counsel for the British Embassy were in the case as *amici curiae* only. No one was in a position to appeal, even if the order be regarded as a final decree reviewable by appeal, which it does not appear to be.

The British Government could not come into the District Court as a claimant without submitting itself to the jurisdiction, nor even so obtain a final decree without litigating the cause on the merits, and thus in effect waiving immunity. If the pri-

vate owners had entered the usual claim, either they would have been obliged to give bond and thus take the question of immunity out of the case under the doctrine of *The Luigi* (*supra*, p. 18), or the vessel would have remained in custody throughout the litigation, thus nullifying her immunity. The only remedy by which the right of immunity can be effectually enforced is thus a writ of prohibition issued out of this Court to the District Court.

As ancillary to relief by prohibition, a writ of *mandamus* commanding the District Court to vacate its order requiring security, and to grant an express stay of process, is also appropriate and convenient. This Court has power to grant this additional relief under §262 of the Judicial Code above quoted (p. 31). This Court will exercise its power in this way to compel an inferior Court, over which it has appellate or supervisory jurisdiction, to vacate an order or decree entered improperly or without jurisdiction, and not reviewable by appeal.

See *In re Metropolitan Trust Co.*, 218
U. S. 312,
Ex Parte Metropolitan Water Co., 220
U. S. 539, 546.

Only in this way can the order by which the District Court undertook to exercise a jurisdiction it did not possess over a vessel entitled to immunity be corrected upon its records. This should be done, for the honor of the American Courts.

Summary.

1. The *Gleneden*, as a vessel in the public service of a co-belligerent foreign Government, is immune from judicial process and the District Court had no power or jurisdiction to arrest or detain her.

2. Such immunity was properly suggested to the District Court, and the facts upon which it depends were declared in a manner not open to judicial enquiry upon contentious testimony, and were recognized by the Court as sufficiently established.

3. This Court has power in this proceeding to correct and restrain this excess of jurisdiction by the District Court, and should do so by the issue of writs of prohibition and *mandamus* as prayed.

Conclusion.

The Rule to Show Cause should be made absolute and this Court should issue to the District Court a writ of prohibition forbidding it to issue, levy or maintain any process against the *Gleneden*, so long as she remains in the service of the British Government, or to detain her by virtue of such process or otherwise, or to exact or require any security as a condition of her release, and also a writ of *mandamus* commanding it to vacate the monition or other writ issued against the *Gleneden*, and the order of November 27th, 1918, and to enter an order staying all proceedings to arrest

or detain the *Gleneden* so long as she shall remain in such Government service.

Respectfully submitted this 6th day of January, 1919.

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Appendix No. 1.SUPREME COURT OF THE UNITED
STATES.

IN THE MATTER

OF

The Petition of JAMES THOMSON
MUIR, Master of the British
Admiralty Transport *Glen-*
eden, for Writs of Prohibition
and Mandamus,

AGAINST

HONORABLE THOMAS L. CHATFIELD,
United States District Judge
for the Eastern District of New
York.

SUGGESTION OF BRITISH EMBASSY.

Now come Frederic R. Coudert and Howard Thayer Kingsbury, counsel for the British Embassy in the United States of America, intervening as *amici curiae*, and suggest and represent to this Honorable Court:

I. That the British Admiralty Transport *Glen-*
eden, which has been arrested under process of
the United States District Court for the Eastern
District of New York, should not have been ar-

rested and should not be detained thereunder, because the said Steamship is an Admiralty Transport in the service of the British Government by virtue of a requisition from the Lords Commissioners of the Admiralty, and is engaged in the business of the British Government, and under its exclusive direction and control, and is under orders from the British Admiralty to sail from the Port of New York forthwith to carry a cargo of wheat belonging and consigned to the British Government, and is not subject to judicial process from the Courts of the United States.

II. That the interruption and delay of the voyage of said vessel by such arrest and detention interfere with the British Government's possession and control of said vessel, and with the Government business upon which said vessel is engaged, and thereby interfere with the efficient conduct of the operations incident to the victorious conclusion of the present war.

III. That said United States District Court for the Eastern District of New York should not have exercised jurisdiction over a vessel in the public service of a co-belligerent foreign Government.

IV. That the British Courts have refused to exercise jurisdiction over vessels in Government service, whether of the British Government or of allied Governments, in the present war, and that by comity the Courts of the United States should in like manner decline to exercise jurisdiction over vessels in the service of the British Government.

V. That the questions involved in this matter are of great importance to the British Govern-

ment by reason of the large number of vessels in the public service of the British Government which enter ports of the United States, and the important relation borne by the Government service performed by said vessels to the efficient conduct of the operations incident to the victorious conclusion of the war.

VI. That said writ of arrest against said Steamship *Gleneden* should have been and should now be quashed and dissolved, and that all proceedings to arrest or detain the said Steamship under said writ, or otherwise, should be stayed so long as said Steamship remains in the service of the British Government as aforesaid.

VII. That by a certain order made by the Honorable Thomas Ives Chatfield, United States District Judge, dated November 27th, 1918, and referred to in the Petition in this matter, the exercise of the right of the British Government to direct and control the movements of said Steamship *Gleneden* was made dependent upon the giving of security by a private corporation, not a party to the cause in which such order was made.

VIII. That such requirement of security defeats and nullifies the immunity from judicial process to which said Steamship *Gleneden* is entitled as an Admiralty Transport in the service of the British Government, and is an attempt to exercise jurisdiction over a vessel in the public service of a co-belligerent foreign Government, over which the Courts of the United States have not and should not take jurisdiction.

IX. That in order to prevent such unlawful assumption of jurisdiction over the Steamship *Glenceden* as a vessel in the public service of the British Government this Court should grant the prayer of the Petition herein, and issue a writ of prohibition directed to said Honorable Thomas Ives Chatfield, United States District Judge, forbidding him to arrest or detain the said Steamship *Glenceden*, or to exact security as a condition of her release, and a writ of mandamus requiring him to release the said Steamship and to stay all proceedings to arrest or detain her so long as she remains in the service of the British Government, and such other or further writ or writs as may be necessary or convenient in the premises.

Dated, December 12th, 1918.

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Appendix No. 2.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

McALLISTER LIGHTERAGE LINE,

INC.,

Libelant,

v.

BRITISH STEAMSHIP ROSERIC,

IN ADMIRALTY.

On suggestion that
the writ of arrest be
quashed or that the
suit be stayed. Suit
stayed.

A vessel belonging to private owners, requisitioned by the British Government and employed by it in the Public Service is immune from arrest under Admiralty process while in such Government service. It is immaterial that the officers and crew continue in the employment of the private owners and actually operate the vessel. The officers and crew, as well as the ship, become for the time being the sovereign's instrumentalities and their possession is the sovereign's possession. In such a case the immunity depends, not upon the ownership or exclusive possession of the instrumentality by the sovereign, but upon its appropriation and devotion to the public service.

The immunity of such vessels arises, not from lack of judicial power, but from the implied consent of one sovereignty to waive jurisdiction over the public instru-

mentalities of another. This principle, which obtains whenever the two sovereigns are in a state of mutual peace and amity, applies with especial force when they are actively engaged as co-belligerents in prosecuting a war against a common enemy.

It is within the discretion of the Court to receive a suggestion from the official representatives of a foreign sovereign appearing by counsel as *amici curiæ* and such suggestion is conclusive as to all its material statements of fact.

It is immaterial that the vessel was released upon an undertaking by the owners to bond her in case the Court should hold that she was not immune from process. For the purposes of this decision the steamship must be regarded as still subject to, or threatened with, process of arrest.

While full immunity is to be accorded the British Government in the use of the vessel while under requisition, it is not necessary to quash the writ of arrest and thus dismiss the suit. It is sufficient to enter a decree staying all proceedings to arrest or detain the vessel so long as she continues in the service of the British Government.

VREDENBURGH, WALL & CAREY; BURLINGHAM, VEEDER,
MASTEN & FEAREY, Proctors for Libellant.
FREDERIC R. COUMET, HOWARD THAYER KINGSBURN,
as *amici curiæ*, Counsel for the British Embassy.
JOHN M. WOOLSEY, appearing specially for the
Steamship *Roseric*.

OPINION.

RELLSTAR, District Judge.

The libel alleges that on April 16, 1918, the Steamship *Roseric* negligently collided with libellant's barge *McAllister Bros., No. 63*, in New York Harbor, to its damage. After seizure by the Marshal, within the territorial jurisdiction of this court, the steamship was released by the order of libellant upon an undertaking by the owners to bond her, in case the court should hold that she was not immune from process, on grounds to be urged on behalf of the British Ambassador. Thereupon counsel for the British Embassy, appearing by leave of court as *amici curiae*, filed a suggestion in the following terms:

"1. The said *Roseric* is in the service of the British Government as an Admiralty transport by virtue of a requisition from the Lords Commissioners of the Admiralty and is engaged in the business of the British Government and under its direction and control;

"2. Any interruption of the voyage of said vessel by arrest or other process will interfere with the Government business upon which said vessel is engaged and thereby with the efficient prosecution of the present war;

"3. This court should not exercise jurisdiction over a vessel in the service of a co-belligerent foreign Government;

"4. The British Courts have refused to exercise jurisdiction over vessels in Government service, whether of the British Government or of allied Governments, and by comity the Courts of the United States should, in like manner, decline to exercise jurisdiction over vessels in the service of the British Government;

"5. The questions involved in this cause are of great importance to the British Government by reason of the large number of vessels in the service of the British Government which enter ports of the United States and of the important relation borne by the Government service performed by these vessels to the efficient prosecution of the present war;

"And, upon such suggestion, for leave to represent to this honorable Court as such *amici curiae* that the said writ of arrest should be quashed and dissolved in so far as it runs against the said Steamship *Roseric*, and that all proceedings to arrest or detain the said Steamship *Roseric* under said writ or otherwise, should be stayed so long as said Steamship *Roseric* remains in the service of the British Government as aforesaid."

From this suggestion and the deposition of the ship's master, which was not offered in evidence but produced for the information of the court, it appears, that while the steamship is owned by a British subject and its navigation in charge of the owner's officers and crew, who receive their compensation from such owner, it, as well as the officers and crew, is under the complete control of the British Government, and is engaged in its business as an admiralty transport, carrying such cargo, and going to and from such ports as that Government directs. For the time being it is appropriated by the British Government for its public use, and was when the collision occurred and the arrest was made.

On the face of the libel, the libelant, an American citizen, has an inchoate lien on the ship, and this court *prima facie* jurisdiction to perfect it. If the arrest is set aside and the writ quashed, the libelant has no present remedy but in the British courts. If the proceedings to arrest

the ship are stayed for as long as it remains in the service of the British Government, the libelant's rights will be seriously prejudiced, and in the end may find itself remediless.

On the other hand, if the right to arrest this ship, so requisitioned, is sustained, the sovereign rights of the British Government, at a time when it is engaged in a war, will be subordinated to those of a private claimant. Furthermore, the right to seize one ship so requisitioned means the right to seize any number of ships similarly conditioned, with the result that during the continuance of the war, not only that Government, but the United States and other sovereignties, co-belligerents in prosecuting such war against the common enemy, will be seriously hampered in their joint struggle to maintain their sovereign rights. It is of no moment that in this case, by arrangement between the proctors of the libelant and the ship's owner, no prejudicial detention of the ship resulted. The right to arrest involves the right to detain; detention includes the probability of loss to the users of the vessel; and exemption from delay of a vessel engaged exclusively in the public service of a nation is as much the privilege of sovereignty as the vessel's exemption from final condemnation. For present purposes the steamship must be regarded as still subject to or threatened with process of arrest. *The Florence H.*, 248 F. 1012.

Libelant asserts that "if this Court drops or stays its jurisdiction that must be done for reasons which our Courts have declared to be not well-founded," and that to grant such immunity would go "far beyond the principles which have been laid down by our courts as determining whether a ship shall be immune from process."

In *The Exchange*, 11 U. S. (7 C. anch.) 116, a pioneer in this field of judicial inquiry, it was held that

“A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country.”

In that case libellant, an American citizen, asserted title to a vessel found within the waters of the United States and in the possession of the French Government which had converted it into a war vessel. Chief Justice Marshall, speaking for the court, after premising that all sovereignties possess equal rights and equal independence, declared that, as a result of mutual intercourse, impelled by a common interest, they “have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers,” and that such jurisdiction “would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects.”

After dealing with the admitted exemptions of the persons of a sovereign, his ambassadors, and the passage of his armies under certain circumstances, from interference by the sovereign of the territory into which they had been permitted to enter, the learned Chief Justice said:

“That all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory—that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it, must be supposed to act” (p. 143).

After pointing out the difference in the status of a private individual and a merchant ship on the one hand and a public armed ship on the other hand, of one nation coming into the territory of another, with reference to amenability to the latter's jurisdiction, and that the foreign sovereign could have no motive for the former's exemption from such jurisdiction, he, referring to the foreign sovereign's attitude to the public armed ship, said:

"She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place, without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality" (p. 143).

The *Exchange* is a strong case, but it has always been accepted as law both here and abroad. There the allegation was that libelants had been wrongfully dispossessed of their vessel by the representatives of a foreign sovereign. The inconvenience or possible injustice that may happen to the libelant in the instant case, if the *Roseric* is held immune from arrest, is incomparable with that apparently sustained by the libelant in the cited case.

The immunity there accorded was not due to a lack of judicial power. The power was assumed, but its exercise was waived out of a due regard for the dignity

and independence of a sister sovereignty with whom this nation was at peace. The implication is that to insist upon jurisdiction in such instances likely would be considered by the foreign sovereign as a reflection upon its dignity and an interference with its independence, and would tend to strain and possibly disrupt amicable relationships.

Though in *The Exchange* an armed ship of war was the subject before the court, there is nothing in the reasoning resulting in its exemption from judicial process, that limited the immunity to that character of vessels. The privilege was based on the idea that the sovereign's property devoted to state purposes is free and exempt from all judicial process to enforce private claims. Such idea is as cogently applicable to an unarmed vessel employed by the sovereign in the public service as it is to one of his battleships. The exemption declared in that case was considered in *The Santissima Trinidad*, 20 U. S. (7 Wheat.) 283, and Mr. Justice Story, who sat in the *Exchange*, in stating the grounds thereof, referred to them as applicable to foreign public ships (p. 3530).

In *Briggs et al. v. Light-boats*, 93 Mass. (11 Allen) 157, Justice Gray, in answering the contention that these light-boats, though owned by the United States, were not intended for military service, and, therefore were subject to judicial process, stated the ground of exemption as follows:

"That immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty; and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted" (p. 165).

In granting immunity to property devoted by a sovereign to public use, neither its ownership nor the particular public use made of it is treated as important in the British courts.

In *The Parlement Belge*, L. R. 5 P. D. 197, immunity was accorded to an unarmed vessel belonging to a foreign sovereign in the hands of officers commissioned by him and employed in carrying mails, though it also carried merchandise and passengers for hire. In that case Brett, L. J., after reviewing the American and other cases, said:

"That as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its course, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction" (p. 217).

In *The Broadmayne*, L. R. (C. A. 1916) 64, the immunity was extended to a ship owned by private parties, while under requisition by the British Admiralty, in an action for salvage. This exemption was granted in spite of the urgings of plaintiff's counsel (being similar to those pressed here),

"that the effect of requisitioning a ship is not to change the ownership, and the ship requisitioned remains the property of the owners notwithstanding the requisitioning, and that when the use of the ship

by the Crown ceases the ship is restored to her owners" (p. 70).

Swinfen Eady, L. J., in reply to such insistence, said:

"That is so, but it does not prevent a ship so long as she remains under requisition being in the service of the Crown, and as such exempt from process of arrest" (p. 70).

In *The Messicano*, 32 T. L. R. 519, a vessel requisitioned by the Italian Government from private owners and carrying war material for that Government, was held to have the same privilege from arrest in a collision case as a ship requisitioned by the British Government.

In *The Erissos*, reported in Lloyd's List, October 24, 1917, pages 5-8, a vessel owned by Greek subjects, and which, by arrangement between the Greek and British Governments, had been requisitioned for the use of the British and Italian Governments, and was carrying coal for the latter, was held free from arrest or detention "so long as the ship shall remain in the service of either the Italian or the British Government for public or State purposes."

These cases, in my judgment, must be accepted as declaring the judicial policy to exercise no jurisdiction over a sovereign, whether local or foreign, or over instrumentalities employed by it in the public service, by any proceedings *in invitum*, regardless of the form or character of the process. The libellant, however, insists that *The Johnson Lighterage Co.*, No. 24, 231 F. 365 and *The Attualita* (C. C. A. 4) 238 F. 909 announce a different rule and control the instant case. The Johnson Lighterage Company case (decided by this court) was a proceeding to recover for salvage services. Both car-

go and vessel were seized. On an order to show cause why such cargo (munitions of war) should not be released from seizure and turned over to the Russian Government who was the owner thereof, it was held that as the possession of the cargo at the time of its seizure was not in that Government but in the charterer of the vessel, under a contract for transportation, it was within the exception declared in *The Davis*, 77 U. S. (10 Wall.) 15 and subject to arrest. The lack of actual possession of the property by the government at the time of seizure is the basis of the exception established by the *Davis* case and distinguishes both it and the *Lighterage* case from the case at bar.

The contention of libellant that as the ship's officers and crew operated the *Roseric*, she was within the exception established by those cases is not tenable. The British Government, in the exercise of its sovereign powers, took the *Roseric* and devoted it to its own purposes. That no change in the officers and crew took place, and that they continued in the employment of the ship's owner is unimportant. The ship, its owner, officers and crew were under the compulsion of sovereignty.

While the fact that the operation of the ship was by the owner's officers and crew may be important on the question of the owner's present and the ship's ultimate liability for the negligence charged in the libel, it is immaterial upon the question of the right of a private individual to enforce such liability by seizing the ship while it remains appropriated to the sovereign's public use. Whether the Government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination.

The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being, became the sovereign's instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force.

In legal effect a ship so subjected to *vis major* is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy. In *The Davis*, with reference to the goods there in question, the court found that the United States was not in the position of a charterer of the vessel, but that "the case was the usual one of a common carrier contracting to deliver goods on his own responsibility," and that "The possession of the master of the vessel was not the possession of the United States. He was in no sense an officer of the government. He was acting for himself, under a contract which placed the property in his possession and exclusive control of the voyage" (pp. 21 and 22).

The Attualita (C. C. A. 4) 238 F. 909 is more in point. In that case, notwithstanding the ship had been requisitioned by the Italian Government and was engaged in its public service, it was held subject to arrest in a proceeding *in rem* to recover damages for an alleged tort. That case was decided before this country became a co-belligerent with the Italian Government in the war against Germany. In all other respects the facts of that case are seemingly identical with those of the case at bar. The District Court had held that the ship was immune from arrest, basing its decision on the ground of international comity. The Circuit Court of Appeals, ob-

serving that to allow the immunity would require it to go beyond any of the decided cases, said:

"There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is in any way responsible."

And after referring to the immunity granted to the diplomatic representatives and the vessels or other property in the possession and control of a sovereignty, it said that such immunity

"can be safely accorded, because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare."

That the seizure of the vessel interfered with sovereignty's rights and deprived it of the use of the ship, unless and until it or the owner thereof submitted to the court's jurisdiction (by bonding, etc.), was not referred to.

So far as the suggested irresponsibility of any one for a tort committed in the operation of a vessel so requisitioned is concerned, it should not be overlooked that the owner could be made personally liable for the negligence of his servants in operating the ship, even though the ship should be exempt; and so far as the ship itself is concerned, the immunity need not be extended beyond the period of the sovereign's requisition. For, as soon as the sovereign restores the ship to the owner, the reason for its immunity is gone.

It seems to me, and I state my judgment with deference, that the decision in that case unduly subordinates the right of sovereignty to those of the individual. The immunity of the sovereign's instrumentalities devoted to public service from the process of its own courts, as I understand the previous cases, is not based upon the idea that it may be "safely accorded," but on account of its dignity and independence and because it is necessary for the well being of the nation that it serves, that it shall not be hampered or interfered with in the use of such instrumentalities.

In the case of the courts of one sovereignty waiving jurisdiction over another sovereignty's instrumentalities, the thought of safety to private litigants, to my mind, is at least equally irrelevant. The immunity in such cases, as already noted, is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for such rights, and to maintain and further amicable relations among them, it is, by tacit agreement, recognized as needful, in certain particulars, that one sovereign should decline to exercise some of its prerogatives when to exercise them would necessarily place another sovereign in a subordinate position.

In line with this thought, the following language of Judge Thompson in *The Luigi*, 239 F. 495, is pertinent:

"It is far more important for the courts of the United States to recognize the international rule of comity that an independent sovereign cannot be personally sued, because such a suit would be inconsistent with the independence and equality among the nations of the state which he represents, than it is to take cognizance of private rights, if, by so doing, that rule is violated" (p. 496).

If these ideas dominate the question whether immunity should be granted to a foreign sovereign's property devoted to the public service, it logically follows that it is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation and devotion to such service that exempts it from judicial process. That in such use the owner of the instrumentality, through its servants, is permitted to remain in physical possession thereof, and, in consequence, may become personally liable for its agents' torts, is of no moment where, as in this case the ship and its entire equipment is under the absolute dominion of the sovereign.

The Florence H., 248 F. 1012, is said by analogy to support the libellant's contention in this behalf. The denial of immunity in that case was based solely upon the ground that by Congressional action (39 Stat. 730) the *Florence H.*, though owned by the United States and devoted to national purposes, because of her employment as a merchant vessel, was made subject to all laws, regulations and liabilities governing merchant vessels. The ground of the decision negatives the pertinency of the citation.

Thus far I have considered this question as if no relations other than those arising from a state of peace and amity existed between this nation and the one suggesting the immunity. If, then, the consent of one sovereignty to waive jurisdiction over the public instrumentalities of another is implied, when the two live in amity, and in part because their mutual well being is promoted thereby, as announced in *The Exchange*, upon what theory is this immunity to be withdrawn from a sovereignty with whom this nation is actively engaged in

prosecuting a war against a common enemy? The mutual benefit that accrues from such exemption in time of peace is at best but little in comparison with that which actually accrues in time of such a war.

The extraordinary conditions that environ the present suggestion of immunity, if they did not bring the instant case within the principle here deduced from the cases, would justify the announcing of one that did. However, as indicated, no such judicial declaration is needed. The *Roseric* is well within such principle, and unless the British Embassy's suggestion is to be disregarded for the reasons now to be considered, must be held immune.

Libellant further contends that the suggestion of the British Government is not conclusive, and, if so intended, is not properly before the court, because not presented by the United States Attorney. As to the conclusiveness of the suggestion: In *The Exchange, supra*, the libellant answered the suggestion interposed on behalf of the French Government and sought to put it in issue. The Supreme Court, however, accepted the facts as declared in the suggestion. In *The Parlement Belge, supra*, the court, to a like contention, by Brett, L. J., said:

"The ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the State. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of *The Exchange*. Whether

the ship is a public ship used for national purposes seems to come within the same rule" (pp. 219, 220).

In the instant case none of the allegations of the suggestion have been put in issue. It is therefore, so far as this case is concerned, sufficient to say that if the suggestion has been properly presented, it is conclusive as to all its material statements of fact. To the same effect, see *The Luigi, supra*, 495-6.

As to the source from which the suggestion came:

What is to prevent one sovereignty from appearing in the courts of another sovereignty? Or, stated more to the point, why should the court of one sovereignty refrain from receiving a suggestion as to its lack of jurisdiction because it comes solely from the representative of a foreign sovereignty? It is not merely a proper, but a commendable practice, for such suggestions to come through the Attorney General or one of his representatives, but is it to be disregarded unless it does so come? No case has been cited that holds as matter of law that such a suggestion will not be received from a foreign sovereign's official representative. True, in *The Luigi, supra*, upon an oral suggestion made in open court—seemingly as *amicus curiae* for a foreign government—Judge Thompson said he "was of the opinion that inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government."

In *The Florence H, supra*, Judge Learned Hand declined to receive the suggestion made on behalf of a foreign sovereign that to assume further jurisdiction might result in diplomatic embarrassment, unless such suggestion came through the diplomatic channels of this Government. But I do not understand that either Judge

Thompson or Judge Hand denied the power of the Court to receive the suggestion through any other channels.

There may be good reasons in a given cause why a suggestion from a foreign sovereignty should not be entertained, save through the executive branch of the government, of which the Court is a part. To my mind, the sources from which such suggestion will be received is a matter of judicial discretion. Each case must be governed by its own circumstances, and *The Luigi* and *The Florence H.* I take to be instances where, in the exercise of judicial discretion, it was thought best not to receive the suggestion made on behalf of foreign governments unless they came through the executive department of our government, and not as determinations that no such suggestions would be received from any other source.

In the instant case there are no considerations influencing the judicial discretion to refuse to act upon the suggestion made directly to the court by the British Embassy. On the contrary, from what has already been said concerning our national interests as a co-belligerent with the British Government in the war pending at the time of the *Roseric's* seizure, they lead so obviously to an opposite determination that in the absence of an intimation from the executive branch of this government, that the public interests would be disserved by receiving such suggestion its rejection would not be justified.

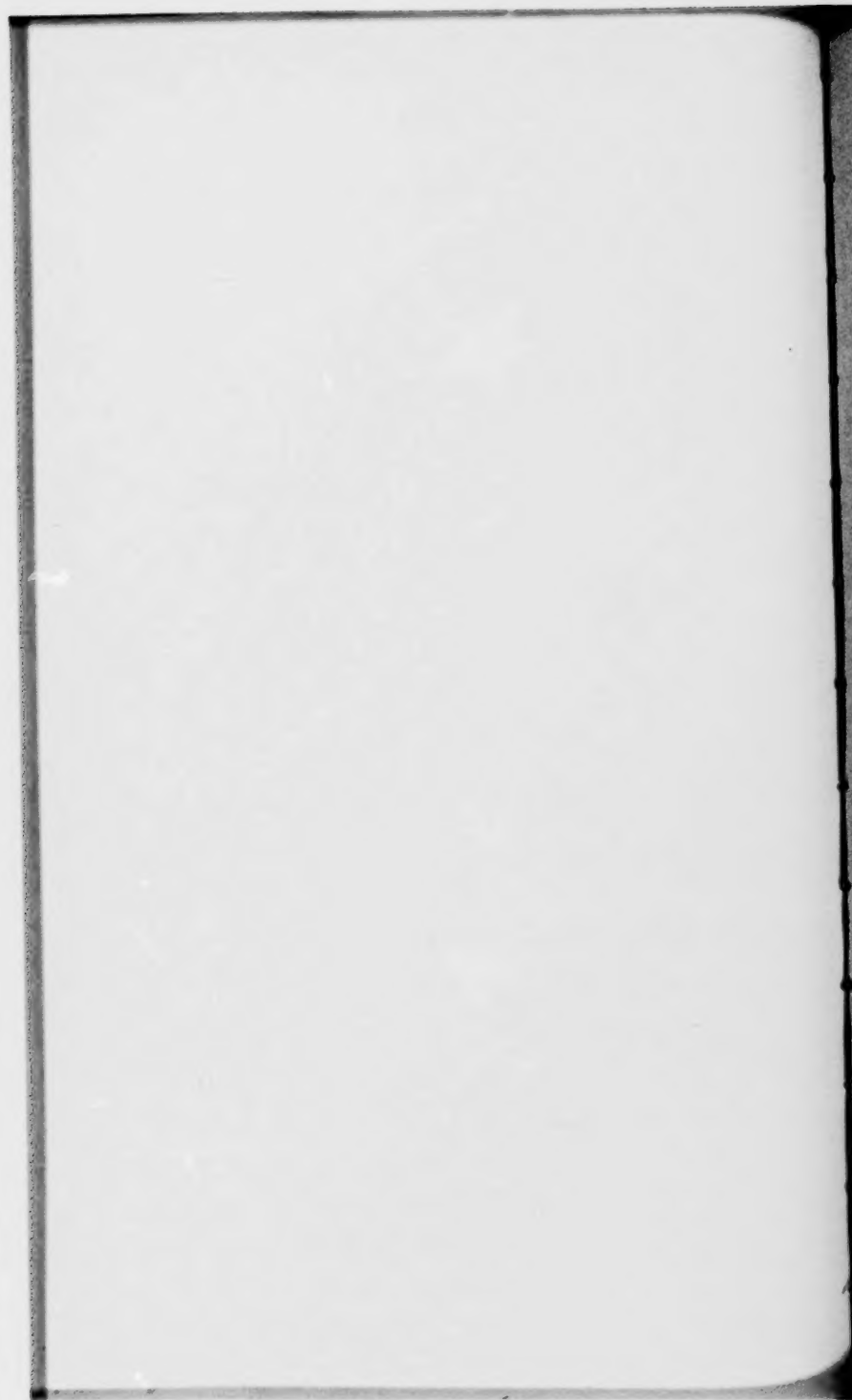
The only remaining question is whether, in following the British Embassy's suggestion, the writ of arrest should be quashed or merely that the suit be stayed. While full immunity is to be accorded the British Government in the use of the *Roseric* while she is under its requisition, no good reason calls for the dismissal of the suit, a result which would follow the quashing of the writ.

A decree may be entered staying all proceedings to arrest or detain the *Roseric* so long as she continues in the service of the British Government.

A TRUE COPY

(Signed) GEORGE T. CRANMER,
Clerk.

(SEAL)



JAN 6 1962

JAMES D. MAHER

OCTOBER TERM, 1918.

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ORIGINAL

IN THE MATTER

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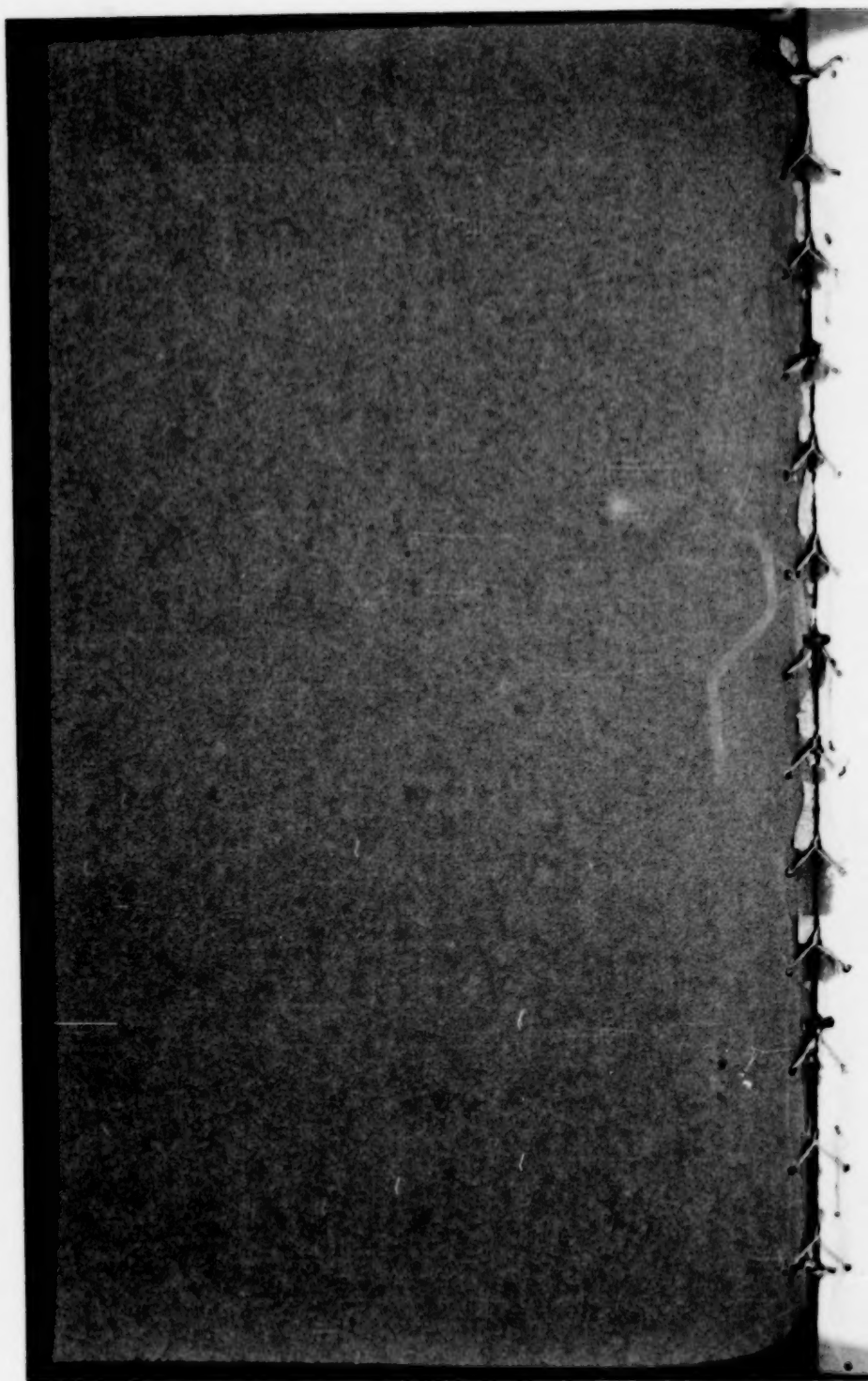
THE PETITION OF JAMES THOMSON MUIR, MASTER OF THE BRITISH
ADMIRALTY TRANSPORT "GLENNEDIN", FOR A WRIT OF PROMOTION
AND/OR MANDAMUS.

Petitioner,

against

HONORABLE THOMAS IVES CHATFIELD, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK, AND THE OTHER JUDGES AND OFFICERS OF THE SAID UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

RETURN.



Supreme Court of the United States.

In the Matter of the petition of
JAMES THOMSON MUIR, Mas-
ter of the British Admiralty
transport Gleneden, for a
writ of prohibition and/or
mandamus,

Petitioner,

AGAINST

The Honorable THOMAS I.
CHATFIELD, United States
District Judge for the East-
ern District of New York,
and the Judges and Officers
of the said United States
District Court for the East-
ern District of New York.

October Term,

1918.

No. 28.

Original.

RETURN.

I, THOMAS I. CHATFIELD, one of the Judges of the District Court of the United States for the Eastern District of New York, in obedience to the Order to Show Cause herein, issued out of this Court on the 16th day of December, 1918, on a petition attached thereto directing the District Court of the United States for the Eastern District of New York and me to show cause why a writ of prohibition and/or mandamus should not issue against the said District Court and me, in

accordance with the prayer of the petitioner, hereby appear, certify and make return as follows:

1. It is true as alleged in the petition, that the British steamship Giuseppe Verdi was duly attached by the Marshal of the said District Court on the 19th day of November, 1918 in an action *in rem*, commenced in said Court by the Societa di Navigazione Transatlantica Italia, as owner of the steamship Giuseppe Verdi, for the recovery of damages sustained by said steamer in a collision with the said steamer Gleneden in the Gulf of Lyons on the 28th day of July, 1917. The steamer was placed in the custody of the Marshal's deputies, who retained possession of her until the 10th day of December, 1918 when, on an undertaking filed by the petitioner in said District Court to give security unless this court should hold the Gleneden to be immune from arrest (Pet. 59)* and on the consent of libellant's proctors (Pet. 58) an order was made and entered by said District Court permitting the Gleneden to leave the physical custody of the Marshal, with the proviso however, that the said order should not be deemed to constitute any withdrawal or any quashing of the writ of arrest (Pet. 57), and staying all proceedings in said action except the filing of papers until 10 days after the entry and service of the order or decree on the final decision of this Court on the petition for a writ of prohibition as contemplated in said undertaking and said order (Pet. 58).

That it is true, as alleged in the petition, that on the 21st day of November, 1918, an order to show cause was directed to proctors for libellant in said action and the United States Marshal of the said District Court ordering them to show cause why the steamer Gleneden should not be immedi-

*This and like references are to pages of the petition.

ately released from arrest on the grounds stated in an unverified suggestion filed in the District Court by Frederic R. Condert, Esq., and Howard Thayer Kingsbury, Esq., purporting to represent the British Ambassador, but appearing only informally as *amici curiæ* and entering no formal appearance or claim on behalf of the said Ambassador.

But it is also true that on the return of said order to show cause, counsel for the libellant objected to the consideration by the Court of the said suggestion and without waiving said objection, denied the allegations contained in said suggestion. The objection was as follows:

"Counsel for the libellant objects to the intervention and appearance herein of counsel purporting to represent the British Ambassador in the United States, and objects to the court's receiving any communication or application designed to effect the release of the British steamer *Gleneden* from arrest under the process of this court on the ground of comity, international relations, or the arrest of alleged public property of the British sovereign, unless such communication is made through the official channels of the United States government to wit, the Department of the Secretary of State and the Department of Justice acting at the instance of the Department of State".

If the master of the *Gleneden* is to be heard in this court, the libellant should be heard as well.

That neither the steamer *Gleneden* nor her owners, nor her master, appeared on the return of the said order to show cause, and that during the hearing thereon the Court directed counsel, who were admittedly acting for them in the matter, viz., Kirlin, Woolsey & Hickox, to appear and be heard

on any reservations they might care to make as to the proper decision to be made on the said return. But said counsel, although then appearing informally by direction of the Court, refused to support or oppose or adopt any attitude in respect to the matters under consideration, stating that it was a matter of no concern to them what the Court might do in the decision of the motion. They were, nevertheless, admittedly representing the owner of the *Gleneden* in the subject matter of the action, as appears from the libel previously filed by the owner of the *Gleneden* in the United States District Court for the District of New Jersey, against the steamship *Giuseppe Verdi* for the recovery of the damages sustained by the *Gleneden* in the same collision as that involved in the action commenced by the owner of the *Giuseppe Verdi* in the United States District Court for the Eastern District of New York (Pet. 31-35); and as also appears from a letter written by them to Proctors for the *Giuseppe Verdi* (Pet. 36).

At the outset of the argument before me on the said motion, counsel for the owner of the *Giuseppe Verdi* called upon the counsel that had filed the suggestion and also called upon counsel for the owner of the *Gleneden* to submit proof of the allegations made in the suggestion specifying, and particularly calling for the ship's (the *Gleneden's*) articles, and the charter party or other instrument of requisition whereunder counsel for the motion claimed that the *Gleneden* was immune from the process of the District Court. Both counsel for the British Ambassador and counsel for the *Gleneden*, in answer to such notice to produce, stated in no uncertain terms that they would produce neither the ship's articles nor the requisition charter, nor any other

proof whatsoever in support of the allegations of the suggestion, contending that I was bound on the assertion of their mere claim to immunity to quash the District Court's process and release the vessel. Counsel appeared and argued the matter on at least four different occasions. As between the libellant and the British Government, I did not go into the question then, although repeatedly during the course of argument counsel for the Giuseppe Verdi called upon counsel to produce the proof in their possession respecting the truth of the allegations in the suggestion, as well as to produce the master of the Gleneden for examination and cross-examination. On every such occasion, however, both counsel for the British Ambassador and counsel for the Gleneden adhered to their refusal to produce any proof whatsoever in support of the suggestion.

An affidavit subscribed by the master of The Gleneden and executed in the office of counsel for The Gleneden, was submitted by counsel for the British Ambassador. This affidavit, however, did not set forth the ship's articles nor the requisition charter, defining the terms of the service performed by the Gleneden, as alleged, for the British Government. When the affidavit was considered it was found particularly unconvincing and wanting in credibility because of the master's refusal and failure to state therein certain facts that were peculiarly within his knowledge and that I conceived had a direct and material bearing upon the question under consideration. I refer particularly to the master's failure to state in the said affidavit the identity of the person or corporation that appointed him, the other officers and the crew and that paid the wages of the master, officers and crew.

While the master must have had peculiar knowledge as to whence the wages of himself, his officers and crew came, he, nevertheless, instead of enlightening me on that subject, deposed, "I receive payments from the Admiralty at regular intervals" (Pet. 26). It would appear to my mind that the master in making this statement sought, without saying so, to have me infer that the Admiralty paid the wages of himself, his officers and crew.

This affidavit would appear also to be misleading in respect to his statement that the *Gleneden* "is *now* (our italics) loading with a cargo of wheat owned by and consigned to the British Government". From the depositions of other officers of the *Gleneden*, taken three days later and filed in the District Court for the Eastern District of New York, it appeared that the vessel was not engaged in loading her cargo when the affidavit was made by the captain or when the vessel was arrested, but that loading had commenced only on the day on which the depositions were taken, to wit, 23 November, 1918.

For the foregoing reasons and the fact that the affidavit consisted chiefly of the master's own conclusions on the subjects about which it did not appear that he was qualified to render a satisfactory opinion, I could attach to his affidavit but little weight.

I find from the record that the libellant filed, in their formal reply to the suggestion (Appendix, *infra*, p. 13) a copy of the usual British time form of requisition charter, under which libellant deposed upon information and belief that the *Gleneden* was being operated, the regular form of requisition charter in use by the United States in the requisitioning of American merchant vessels (Appendix,

infra, pp. 29-50), the depositions of the Gleneden's officers as above referred to, taken on behalf of the owner of the Gleneden for use in the litigation commenced by it in the District Court for New Jersey and a certificate of the entry made in the United States Custom House on arriving here in November, 1918.

In the depositions so filed appears the following testimony:

Alexander Marshall, Chief Engineer, testified:

"Q. You have been on the ship since 1911?

A. Yes.

Q. As Chief Engineer?

A. As Chief Engineer.

Q. Who employed you?

A. When I joined in 1911?

Q. Yes.

A. It was the owner, Mr. Napier.

Q. Is he an officer?

A. Well, rather, to put it right, it was the Superintending Engineer employed me.

Q. Of the Gleneden Steamship Company?

A. Yes.

Q. The owner of the Gleneden?

A. The owner was Mr. Napier. It was the Superintendent of the Gleneden Steamship Company employed me.

Q. You are still under his employment?

A. Still under him as far as I know. I don't know, of course ships is getting turned around now-a-days, you don't know who you are under.

Q. You receive your money now, as usual from the owner?

A. I receive my money from the captain.

Q. Has he always done that since you joined the ship?

A. The captain has always paid me my money."

"Q. Where is the captain that was on your boat at the time of the collision?

A. Well, he stayed home for a holiday this time.

Q. Just this trip?

A. Just this trip, he has been a long time. He has been ten years—nine years without a holiday and the submarines and like of that they got on their nerves. They wanted a spell off for a voyage.

Q. The owners put another man on the ship then, did they?

A. Yes, for the voyage, as far as I understand."

Q. Are there other men on this ship that had been on her at the time of the collision?

A. Yes, the Second Engineer, and there is the Third Engineer, he was Fourth at that time.

Q. Had they been on her prior to 1915, will you say?

A. Prior to the collision?

Q. Prior to a couple of years before that?

A. The Second Engineer was but I am not just sure about the Fourth."

Q. The Second Engineer has been practically as long as you have?

A. He has. He has been on since 1911."

Thomas M. Hay, Second Engineer, testified:

Q. By whom were you employed, The Glendened Steamship Company, the owners of the steamer?

A. Yes.

Q. How often are you paid by them?

A. At the end of every voyage."

Ronald Wallace, the Third Engineer, testified:

Q. When were you employed as an engineer on this vessel?

A. On this steamer?

Q. Yes?

A. Since November, 1915.

Q. Who hired you?

A. I was in the company before, you see.

Q. You had the Gleneden Company before?

A. Not The Gleneden Company, but Gardner & Company, it is the same Superintendent Engineer for that company as The Gleneden Steamship Company.

Q. Both steamship companies have the same superintendent?

A. The same superintendent.

Q. So you were hired by him for the Gleneden, or, rather, transferred to the Gleneden?

A. Yes.

Q. What had you been on before that?

A. The Oronasey.

Q. That was one of the Gardner steamers?

A. One of the Gardner steamers.

Q. Did he give you any back wages at that time?

A. When I joined the present steamer?

Q. Yes.

A. The wages all over were increased at that time."

Q. You still continue to get the same wages from your owners as you got then?

A. No, they have been increased since then.

Q. Your owners still continue to pay your wages?

A. When we pay off, I don't know how it is in America, but we get paid off in the shipping office.

Q. That is when you complete the voyage?

A. When the ship goes home.

Q. Whenever you go home you are paid off by the shipping office, by the agents?

A. The captain gets the money and the shipping clerk tallies the money.

Q. The captain gets the money from the owners and he turns it over to the shipping clerk?

A. The captain draws the money out of the bank, I suppose."

Q. That is the same system followed all along?

A. Yes.

Q. And the same in the Gardner steamers?

A. Yes.

Q. How long were you in the Gardner steamers?

A. Fifteen months.

Q. In other words, since the first part of 1914?

A. Yes."

During the course of the argument, counsel for the British Ambassador reported that Judge Rellstab in the United States District Court for the District of New Jersey had handed down an opinion in the case of *The Roseric* and that the facts touching the *Roseric*, as set forth in Judge Rellstab's opinion were in all respects identical with the facts relating to the *Gleneden* and the services she was rendering for the British Government. A copy of Judge Rellstab's opinion was handed to me by counsel for the British Ambassador at the time, and the argument was made that I should decide in line with the *Roseric* decision. This statement, made in open court, on the part of the counsel for the British Ambassador, considered in connection with the facts set forth in the *Roseric* opinion, which were stated by Judge Rellstab to be in all essential respects identical with the facts involved in the case of the *Attualita* decided by the Circuit Court of Appeals for the Fourth Circuit and reported in 238 Fed. Rep. 909, enabled me, together with the other proofs submitted in the case, to come to a decision on the motion for an order quashing the process against the *Gleneden*. I should add, however, that I had also the advantage of representations made to me by the United States Marshal who had attached the *Gleneden* and observed the conditions prevailing aboard her. He informed me that the *Gleneden* bore no British naval pennant,

had on board no one in uniform or otherwise appearing to be an officer of the British Government or navy, and appeared in all respects to be an ordinary merchant steamer whose movements and control was subject to the direction of the agents and not the orders of the British Admiralty alone.

On all the facts thus put before me, I found that the *Gleneden* was owned by and was still in the beneficial possession of the *Gleneden Steamship Co., Ltd.*, a private British corporation who, through its servants, was in the actual control of the steamer and of her navigation, but engaged in performing certain more or less public services for the British crown under a contractual arrangement amounting to the usual or government form of time charter party. I decided accordingly that the *Gleneden* was not a public ship in the sense that she was either a government agency or entitled to immunity. I therefore denied the motion.

In this court's consideration of my opinion, it should be noted that I was moved from the beginning with a desire not to interfere with the interests of the British Government to any greater degree than was actually necessary for the due preservation of the libellant's rights, and I made every effort to induce counsel for the *Gleneden* to furnish a bond enabling me to release the steamer, a step that it appears the *Gleneden* owner was required to take under its charter of the steamer to the British Government, and a step that was indeed taken on the 10th day of December, 1918, as shown in the petition (Pet. 57-60).

As alleged in the petition, the petitioner sought to appear specially in the action to attack the jurisdiction of the District Court after the return day of the process had passed, and the re-

turn had been adjourned by Judge Edwin L. Garvin on request of a clerk from the office of Kirlin, Woolsey & Hickox, but nevertheless no application has been made to the District Court by the petitioner to release the vessel or to determine the question of jurisdiction in so far as the same affects his and his owner's interest, and in so far as the same is raised by the rule granted by this court on his petition.

There will be found in an appendix to this return (pp. 13-15. *infra*) a formal reply of the owner of the Giuseppe Verdi to the suggestion filed in the District Court containing a form of the British requisition time charter, the regular form of United States requisition time charter, a certificate of the United States Custom House at New York as to the report and entry of the Gleneden on her arrival here on the voyage on which she was arrested in the action in the District Court, and copies of the opinions as yet unreported, of Judge Rellstab in the case of the Roseric, and of Judge Morton in the case of the Lake Munroe, all now filed in the District Court.

I respectfully submit that the United States District Court for the Eastern District of New York had jurisdiction of the subject matter of the suit, and of the *res* therein attached, and properly exercised its judicial discretion to retain the same.

2. This petition is made by the master of the vessel who has refused, as have the owners of said vessel, to appear in the action and both of whom would be in default in said action except for an order of the District Court staying the entry of any decree on default, upon security given by stipulation with the proctor or the libellant.

3. That the said master or owners have no standing to appear and pray this Court to vacate a decree of the District Court unless by appeal or unless their application is of itself an appearance in the action, in which case process should be directed to the parties to this litigation rather than to me as a Judge of the District Court. The owners and master have made no motion in the District Court to vacate the decree.

4. The party to the original decree was alleged to be the British Government. The master of the vessel was (after actual presence in Court by Proctors) given full opportunity to appear and warned that he and they would be held to have defaulted in claiming said vessel. The said Proctors thereupon denied the power of the Court to take such default and are now seeking to evade the proposition by asking this Court to hear and agree to the claim of the British Government although that government have never filed any claim beyond a mere suggestion and although the master and owners of the vessel are alleging that the British Government is the real party in interest.

5. The District Court, while ordering the owners to appear if they claimed any rights in the vessel, found that the British Government was not dealing with the boat as a public vessel in the sense claimed by the adjudicated cases and also found that the owners and its agents were in direct control thereof in dealing with the U. S. Marshal of this District and this Court. It then added further findings and conclusions to the opinion already delivered orally and held that no proper claim was presented by the British Government and that the

Gleneden was not a "public vessel" of the sort alleged, and filed the written opinion on Nov. 27, 1918, which shows the entire oral opinion and the written additions thereto.

Having fully answered the petition, it would appear that said rule should be dismissed and said writ denied, and that I be hence dismissed.

IN WITNESS WHEREOF, I, THOMAS L. CHATFIELD, one of the Judges of the District Court of the United States for the Eastern District of New York, have hereunto set my hand and the seal of said court this 4th day of January, 1919.

[SEAL OF COURT] THOMAS L. CHATFIELD,
U. S. Dist. Judge.

Appendix.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE EASTERN DISTRICT
OF NEW YORK :

SOCIETA DI NAVIGAZIONE TRANSATLAN-
TICA ITALINA

AGAINST

The Steamer GLENEDEN, her engines,
boilers, tackle, &c.

The libellant herein for a further reply to the suggestion filed herein by Frederic R. Coudert, Esq., and Howard Thayer Kingsbury, Esq., *amici curiæ*, upon information and belief respectfully alleges and propounds as follows :

FIRST: Libellant reiterates and reserves, as though fully set forth herein, the objection, duly made in this cause immediately following the filing of the said suggestion, to its consideration by the Court and to the form, source and manner of its presentation to this Court.

SECOND: Libellant reiterates and repeats, as though fully set forth herein, its denial, duly made in open Court immediately following the filing of said suggestion, of the allegations contained therein, and its further denial of said allegations as contained in the affidavit of Joseph A. Barrett, Esq., dated 22 November, 1918, and filed herein.

THIRD: Libellant further alleges that the steamer Glenden, if in the service of the British Government, was tendered to the British Admiralty for service in what is known as the "Mercantile Fleet Auxiliary" on the terms and conditions of a

tender, a true copy of which is hereto annexed marked Exhibit 1 and made a part hereof; and that if said steamer Gleneden's services have been and are being enjoyed by the British Admiralty, such services have been and are being enjoyed only by virtue of said tender and by virtue of a time charter-party made, following, and in acceptance of, said tender, between the British Admiralty and the owners of the steamer Gleneden in the form in customary use for the charter by the British Admiralty of private mercantile steamers, to-wit, "Charter Party, A. (without demise to the Crown)", a true copy of which form of charter-party is hereto annexed marked Exhibit A and made a part hereof.

Libellant further alleges that said charter-party between the British Admiralty and the owners of the said steamer Gleneden, whereunder said vessel is being operated, differs materially from the form in use for bare-boat or demise charters, to-wit, "Charter Party, B. (with demise to the Crown)", a true copy of which form is hereto annexed marked Exhibit B and made a part hereof.

FOURTH: Libellant reiterates and repeats, as though fully set forth herein, all of the facts in the affidavit of Joseph A. Barrett, Esq., dated 22 November, 1918, and on file herein.

WHEREFORE libellant prays that the said suggestion be dismissed with costs, and that it have the decree and other relief prayed for in the libel herein.

BUTLER, WYCKOFF & CAMPBELL,
Proctors for Libellant,
54 Wall Street,
Borough of Manhattan,
New York City.

STATE OF NEW YORK, }
County of New York, } ss.:

ALEXANDER J. McDONNELL, being duly sworn, deposes and says:

That he is the duly authorized agent of the firm of McDonnell & Truda, agents in the United States for the libellant herein; that he has read the foregoing reply to the suggestion and is familiar with the contents of the same; that the same is true of his own knowledge except as to those portions therein alleged on information and belief, which he believes to be true. The sources of his knowledge and the grounds of his belief are statements made to him by other agents of the libellant herein and information obtained from agents of the United States Shipping Board; and that the reason why this verification is made by deponent and not by the libellant is that the libellant is a foreign corporation, none of whose officers is now within the United States; that none of the firm of McDonnell & Truda are within the United States where deponent is duly authorized to make this verification for libellant on its behalf and stead.

ALEXANDER J. McDONNELL.

Subscribed and sworn to }
before me this 12th }
day of December, 1918. }

JOSEPH A. BARRETT.

Notary Public, Bronx County, No. 71, Reg. 970

New York County, No. 481, Reg. 9406

Kings County, No. 122, Reg. 9178

Commission expires March 30, 1919

[SEAL]

Exhibit 1.**TENDER.—MERCANTILE FLEET AUXILIARY.**

SHIP'S NAME				
National Flag sailing under	If fitted with Wireless Telegraphic Apparatus— If so, what system?			
When built	Nominal Horse-Power and Description of Engines			
Class, and in what Register	Maximum I. H. P. obtainable			
Tonnage } by Register } Net	Mean Draft of Water	Deep Draft	feet	inches
Gross				
Single or Twin Screw or Turbine	Where lying	Light Draft	feet	inches
Average } Knots Ocean } Speed } per hour				
Consumption of Coal at that speed in 24 hours	Nature of the last Cargo conveyed			
No. of Tons of Coal which she can stow in Permanent Bunkers	If cleared of Cargo			
No. of Tons of Coal which she can stow in Reserve Bunkers	Date of Board of Trade Passenger Certificate			
If fitted with Electric Light.	On what Date will be ready	To be Surveyed To commence Fitting		

N. B. THE TENDER MUST CONTAIN THE PARTICULARS REQUIRED ON THE OTHER SIDE, AND MUST SPECIFY, IN WORDS AS WELL AS IN FIGURES, THE RATE AT WHICH THE SHIP IS OFFERED. ANY CONDITIONS OR ALTERATIONS WHICH THE PARTIES TENDERING MAY WISH TO SUGGEST MUST BE SEPARATELY STATED ON THE SIXTH SIDE OF THIS SHEET, IN ORDER TO AVOID INTERLINEATIONS, AND REFERENCE TO SUCH CONDITIONS MUST BE MADE AT THE FOOT HEREOF.

We hereby offer to the Commissioners for executing the Office of Lord High Admiral of the United

Kingdom of Great Britain and Ireland the above ship, to be by them accepted at their option upon the terms of either of the two Charter Parties herewith, marked respectively A and B, and signed by us contemporaneously herewith, and in the case of the Charter Party marked A, subject to the Regulations for His Majesty's Transport Service and to the Instructions for Masters of Transports which we have inspected.

In the event of this Tender being accepted on or before the _____ upon the terms of either of the said Charter Parties, we engage that the Ship shall be at _____ on or before the time above-mentioned, ready on the owner's part in every respect, and we also engage to execute to the Admiralty a Charter Party in the form of whichever of the two above-mentioned shall be by them accepted and adopted, and at the request of the Admiralty and on the cancelment of the Charter Party so executed to execute a Charter Party in the other alternative form above-mentioned.

And in the event of the Admiralty accepting the Ship, and of a breach of any of the above-written engagements, we do hereby (jointly and severally) engage to pay to His Majesty, His heirs and successors, a sum equal to one-fifth of a month's hire of the Ship, such payment to be as and for liquidated damages to be recovered together with full costs of suit, and in case of a breach of any of the above-written engagements, the Admiralty to have the option of rejecting the Ship altogether.

Brokers or Owners.
Address,

Should the Tender be made by a Broker the following authority must be signed by the Owner.

And further, _____ do hereby authorize to agree with the said Com-

missioners, and to execute to them on behalf Charter Parties in the Forms above-mentioned, and on the terms and conditions aforesaid.

Owner.

Address.

S. B. All tenders must be enclosed in sealed envelopes, marked "Tender for Mercantile Fleet Auxiliary," addressed to the Director of Transports, Admiralty, London, and are to be delivered as notified in each case.

Winches { Number.
Speed.
Lifting Power.

Diameter of Barrel.

Where Exhaust.

Number and Length of Derricks }

Lifting Power—are they fitted
with Wire Topping Lifts }

Masts { Number
Height from Deck to Rigging Band
Diameter at Deck

	Ladders.		Decks.						Cranes.				
	Ft.	In.	Fore.		Midships.		Aft.			Deck to Deck.		Deck to Mast.	
			Ft.	In.	Ft.	In.	Ft.	In.		Ft.	In.	Ft.	In.
Shelter Deck...													
Main Deck...													
Lower Deck...													
Orlop Deck...													

	BOTTLES OR PORTS.		HATCHWAYS.		COMPARTMENTS.	
	No.	Size.	No.	Position.	No.	How many Watertight.
Shelter Deck...						
Main Deck...						
Lower Deck...						
Orlop Deck...						

ACCOMMODATION.

Rating: Where placed?	Cabin.			Remarks.
	(Full details to be given.)			
What number can sleep at one time?	No.	No. of berths in each	Where placed?	
1st Class.....				
2nd Class.....				
Crew.....				

Exhibit A.

CHARTER PARTY, A. (without demise to the Crown).

This CHARTER PARTY of Affreightment made this
day of by and be-
tween the Commissioners for executing the office
of Lord High Admiral of the United Kingdom of
Great Britain and Ireland (for and on behalf of
His Majesty), hereinafter called the Admiralty of
the one part, and

their executors, administrators, and assigns for and
on behalf of the Owners of the Ship, hereinafter
called the Owners, of the other part: WHEREBY IT IS
WITNESSED AND AGREED as follows:

1. A copy of the Regulations for His Majesty's
Transport Service and a copy of Instructions for
Masters of Transports have been delivered to the
Owners before the Execution hereof, as they do
hereby admit, and the said Regulations and In-
structions are to be taken to be incorporated in
and to form part of this Charter Party.

2. Subject to the Conditions and Rules specified
in the said Regulations, the good ship under-men-
tioned, viz. :—

Ship's Name.	Gross Tons by Register.	Master's Name.
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shall be at the service of the Admiralty to the
extent hereinafter mentioned, on and from the
day of 19 for

the space of calendar months certain, and thenceforward, until the Admiralty shall cause notice to be given to the Owners or to the Master or other person having charge of the said ship, on her arrival in port at that she is discharged from the said service.

3. The Admiralty may, at any time, during the continuance of the said service upon giving notice to the Owners of their intention so to do, purchase her at the price of

(£) or in the case of her being required for service as an armed cruiser they may upon giving the like notice purchase her together with such quantities of plated ware, cutlery, earthenware, blankets, counterpanes, and linens, as would be necessary for the number of Officers and Warrant Officers who shall form part of the ship's complement as an armed cruiser at the price of (£).

4. The said ship shall at all times during the continuance of the said service be strong, firm, tight, staunch and substantial, both above water and beneath, and in every respect seaworthy, and properly manned, fitted, stored, furnished, equipped and found at the proper cost and charge of the said Owners, and shall proceed to such ports or places as the Admiralty or any Officer authorized by them shall from time to time order and direct, and so from time to time during the continuance of the said ship in the said service, and in the performance of all services required to be performed under the regulations aforesaid, the said Master and his crew, with his boats, shall be aiding and assisting to the utmost of their power.

5. The Master or other person having charge of the said ship shall not nor will take or permit to be taken on board thereof during the continuance of the said service any passengers, goods, letters, or effects, without the license and consent in writing of the Admiralty or the Officer authorized in that behalf, for that purpose first had and obtained, and (for and on behalf of and as the servant of the Owners) shall obey all orders and instructions which he may receive from the Admiralty, or any Officer authorized by them, and shall in all respects comply with the said Regulations for His Majesty's Transport Service, and with the Instructions for Masters of Transports.

6. The Owners of the said ship shall be held responsible to His Majesty for any deficiency in transit or any loss or damage which shall arise to the public stores or provisions from the state of the ship's stowage, or from any incapacity, want of skill, insobriety, or negligence on the part of the Master, Officers, or crew of the said ship, or any of them, according to such valuation as shall be set on such stores or provisions by the proper Officer of the Department to which they shall belong. And the Owners of the said ship shall further be held responsible to His Majesty for any loss or damage arising from the causes aforesaid, or any of them, to all such equipment and other property on board the said ship of any person in His Majesty's Service as the Admiralty shall include in any claim against the Owners, and declare and adjudge to have been authorized or necessary for the discharge of such person's public duties, and that the owners shall (without prejudice to any claim of such person in respect of private property not included in the claim of the Admiralty) pay to the Admiralty the

value of such lost or damaged equipment or other property, which value shall be ascertained and certified by the proper Officer of the service to which such person belongs, provided that so soon as the Owners shall have paid to the Admiralty the said value of the said equipment, or other property, the Admiralty shall hold the Owners harmless and fully indemnified against all claims, suits and demands, whatsoever, in respect of the said equipment or other property.

7. The liability of the Owners arising from negligent navigation of the ship shall be limited, as provided by the Merchant Shipping Acts, 1894-1907.

8. The Owner shall be allowed and paid for the freight of the said ship at the rate of

per ton per calendar month,

for the number of tons above-mentioned during such time as the said ship shall be continued in, and shall duly and efficiently perform the service for which she is hereby engaged.

9. The Owners on the acceptance of the tender of their vessel in accordance with the terms of this Charter Party, shall be entitled to receive a Bill for one calendar month's freight upon account, and in part payment, according to the rate and tonnage aforesaid. Provided it be certified by the Inspecting Officer that the said ship is ready to proceed upon His Majesty's Service; and after the said ship shall have been in the said service two calendar months from the commencement of the said service, and the Owners shall have produced to the Admiralty a Certificate, in the required form, the Owners shall be entitled to receive a further

Bill for a moiety of one month's freight upon account, in manner aforesaid, and after the said ship shall have been in the said service three calendar months, and the Owners shall have produced to the Admiralty a like Certificate as aforesaid, the Owners shall be entitled to be paid a further Bill for another moiety of one month's freight upon account; and each month after during the ship's continuance in the said service, if a like Certificate as aforesaid shall have been produced, the Owners shall be entitled to receive a further Bill for one month's freight on account, and shall be paid the balance of freight on the passing in office of the requisite accounts and documents after the discharge of the said ship; all which aforesaid payments shall be made in England * by Bills payable at sight by His Majesty's Paymaster-General.

10. If at any time or times hereafter it shall be made to appear to the Admiralty that any delay has been caused by breach of orders or neglect of duty, or that the said ship has become incapable from any defect, inefficiency, breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, then and in any such case it shall and may be lawful, to and for the Admiralty to retain in arrear the pay of the ship for two months, and to put the said ship out of pay, and to make such abatement by way of mulct out of the freight of the said ship as the Admiralty shall adjudge fit and reasonable.

11. If the said ship shall happen to be by the enemy burnt, sunk, taken or injured during the aforesaid service, and it shall be made to appear

* This clause is to be modified, as may be necessary, in Charter Parties executed abroad.

to the satisfaction of the Admiralty that the same did not proceed through any fault, neglect, act or omission on the part of the Master or the ship's company, and that he and they made the utmost defence he and they were able to make, the value of the said ship or injury thereto shall subject to the provision hereinafter mentioned be paid for by His Majesty, according to the valuation made thereof on declaration of Officers of the Admiralty (reasonable wear and tear first deducted); Provided always that if the said ship shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause, or shall be burnt, sunk, or taken by the enemy in consequence of any such event happening in all such cases the loss, injury or damages thereby accruing shall be considered as a sea risk, and His Majesty in such case shall not be liable to pay for the same or be in any manner prejudiced thereby.

12. No Member of the House of Commons shall be admitted to any share or part of this Contract and Agreement, or to any benefit to arise therefrom.

13. For the due performance of all and singular the conditions and agreements herein the Owners do hereby bind and oblige themselves and the said ship, her apparel and furniture, unto His Majesty, His heirs and successors, in the penalty or sum of ONE THOUSAND POUNDS of lawful money of the United Kingdom of Great Britain and Ireland.

.....
Broker or Owner.

Exhibit B.

CHARTER PARTY, B. (with demise to the Crown).

This CHARTER PARTY of Affreightment, made this day of
by and between the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland (for and on behalf of His Majesty) hereinafter called the Admiralty of the one part, and

their executors, administrators, and assigns for and on behalf of the Owners of the Ship undermentioned, and hereinafter called the Owners of the other part: WHEREBY IT IS WITNESSED AND AGREED as follows:—

1. The Owners have let and the Admiralty have hired and taken to freight the good ship undermentioned, viz.—

Ship's Name.	Gross Tons by Register.	Master's Name.
--------------	-------------------------	----------------

for service and employment on Monthly hire from the day of
19 for the space of
calendar months certain, and thenceforward, until the Admiralty shall cause notice to be given to the Owners that she is discharged from His Majesty's Service, such notice to be given when the said ship is in port in

2. The Admiralty may at any time while the said ship is so on hire as aforesaid upon giving notice to the Owners of their intention so to do purchase her at the price of

(£) or in the case of her being required for service as an armed cruiser they may upon giving the like notice purchase her together with such quantities of plated ware, cutlery, earthenware, blankets, counterpanes, and linens, as may be necessary for the number of Officers and Warrant Officers who shall form part of the ship's complement as an armed cruiser at the price

(£).

3. The Admiralty may at any time alter or remove all or any of the fittings or arrangements on board the said ship, and may erect any new fittings which may be required to render the ship available for service as a mercantile fleet auxiliary, provided that the said ship, her outfit and machinery, shall, at the cost of the Admiralty, be restored to and be given up to the Owners in the same condition in which they were when taken by the Admiralty, ordinary wear and tear alone excepted.

4. The said ship shall while she is so on hire as aforesaid be at the absolute disposal of the Admiralty and under their complete control in every respect.

5. The Admiralty shall pay in manner following for the hire of the said ship at the rate of

per ton per
calendar month for the number of tons above-mentioned during such term as the said ship shall be continued in His Majesty's employ.

6. The Owners so soon as it is certified by the Government Officer charged with the transport duties at the port from which the said ship proceeds to sea that the said ship is ready to proceed on His Majesty's Service shall be entitled to receive a Bill for one calendar month's hire upon account in part payment according to the rate and tonnage aforesaid, and after the said ship shall have been in the said service two calendar months from the commencement of the said service, the Owners shall be entitled to receive a further Bill for a moiety of one month's freight upon account, and after the said ship shall have been in the said service three calendar months, the Owners shall be entitled to receive a further Bill for a moiety of one month's freight upon account, and thenceforth monthly during the ship's continuance in the said service the Owners shall be entitled to receive a further Bill for one month's hire on account, and shall be paid the balance of hire, if any, on the passing in office of the requisite accounts and documents after the discharge of the said ship, all which aforesaid payments shall be made in England* by Bills payable at sight by His Majesty's Paymaster-General.

7. All risk and expense of ship and stores shall be borne by the Admiralty during the continuance of the ship's service under this Charter Party.

8. No Member of the House of Commons shall be admitted to any share or part of this Contract or Agreement, or to any benefit to arise therefrom.

* This clause is to be modified, as may be necessary, in Charter Parties executed abroad.

9. For the due performance and keeping of all and singular the conditions and agreements herein the Owners do hereby bind and oblige themselves and the said ship, her apparel and furniture, unto His Majesty, His heirs and successors, in the penalty or sum of ONE THOUSAND POUNDS of lawful money of the United Kingdom of Great Britain and Ireland.

.....
Broker or Owner.

**Form of Requisition Charter in Use by
United States.**

CODE WORDS:

Requisition Charter—Retra.

Time Form—Merof.

Bare Boat Form—Erab.

U. S. S. B. CHARTER

Form No. 2

**UNITED STATES OF AMERICA
REQUISITION CHARTER**

Name of steamship.....
Type of steamship.....
D. W. tonnage.....
Gross tonnage.....
Passenger capacity.....
Knots per hour.....

Date on which vessel entered into pay

THIS REQUISITION CHARTER made and concluded upon in the District of Columbia the day of, (1) 1917, between

of (2)
 of, owner of the good
 American Screw Steam-
 ship (3) of
 of tons gross
 register (4) and tons net register, built
 in, having engines of (5)
 nominal horsepower, provided with proper cer-
 tificate for hull and machinery, and classed
 at (6) of about
 cubic feet capacity and
 tons dead-weight (7) capacity, summer freeboard,
 inclusive of permanent bunkers, capable of making
 an average voyage speed when (8) loaded of
 knots an hour, under ordinary conditions, on a con-
 sumption of about tons of (9) coal, or
 about barrels of oil per 24 hours; and the
 United States of America, through the United
 States (10) Shipping Board— (11)

WITNESSETH: (12)

WHEREAS, by Requisition Order, dated,
 1917, pursuant to the Urgent Deficiency Act (13)
 15 June, 1917, and the President's Executive Order
 11 July, 1917, the United States has requisitioned
 the use of the (14) steamship,
 and the steamship has been delivered into posses-
 sion of the United (15) States pursuant to the
 Requisition; and (16)

WHEREAS, it is desired by the United States and
 by the owner to fix the compensation (hereinafter
 called hire) (17) which the United States shall pay
 to the owner for use of the steamship so requis-
 itioned, and to define by agreement (18) the rights
 and duties of the United States and of the owner

with respect to the operation of the vessel under the Requisition, (19) and with respect to other matters in connection therewith; (20)

NOW, THEREFORE, IT IS AGREED AS FOLLOWS: (21)

FIRST. The terms and conditions under which the vessel is to be operated shall be those contained in the "Time (22) Form" hereto annexed; provided, however, that at the time of the Requisition or at any time thereafter, on five days' (23) written notice, the United States may operate the vessel under the terms and conditions contained in the "Bare Boat (24) Form" hereto annexed, such operation to begin when the steamship is in a United States port. (25)

SECOND. In consideration of the compensation provided and the other obligations assumed by the United States (26) hereunder, the owner accepts this Requisition Charter in full satisfaction of any and all claims he has or may have (27) against the United States arising out of the Requisition and accepts the compensation herein provided for as the just (28) compensation required by law; provided, however, that the acceptance of this Requisition Charter shall be without (29) prejudice to the claim, if any, the owner may have against the United States arising out of recoveries against the (30) owner by third parties on the vessel's commitments. (31)

THIRD. Upon giving five days' written notice to the owner the United States may at any time, when the vessel (32) is in a United States port, cancel

this Requisition Charter without prejudice to the accrued rights of either party. (33)

.....

Owner.

By.....

THE UNITED STATES SHIPPING BOARD,

By.....

Witness to the signature of—

.....

Witness to the signature of—

.....

1924—17

TIME FORM

—

WHEREAS, the United States has determined to deliver possession of the vessel to the owner to be operated by the owner (1) for the United States; (2)

NOW, THEREFORE, IT IS AGREED AS FOLLOWS: (3)

Period of
service

Vessel to be
completely
equipped
and fit

FIRST. The steamship shall remain in the service of the United States under the Requisition Order to be employed as and where the United States may from time to time determine and for such period of time as the United (5) States may determine, but such period shall not extend beyond the first arrival of the steamship in an American port (6) six months after peace is declared unless she shall be required for Government purposes. The vessel, when placed (7) at the disposal of the United States, as directed by it, shall be or shall forthwith be made by and at the expense of (8) the owner tight, staunch, strong, and well and suf-

efficiently tackled, appuraged, furnished, outfitted, and equipped, and (9) in every respect seaworthy and in good running order and condition; and shall be fit for the service in which she has (10) usually been employed, having on her delivery United States inspection certificate that she has met all requirements (11) to fit her for the trade in which she is employed at the time of the Requisition, except that no such certificate shall (12) be required if she be a foreign-built vessel not at present subject to the United States Steamboat Inspection laws as (13) provided in the Panama Canal act, as amended 18 August, 1914; and having a full complement, including the master, (14) officers, and crew, for a vessel of her tonnage. Any deficiency in these respects must be remedied forthwith by and at (15) the expense of the owner; and any time lost in remedying any such deficiency is not to be paid for by the United States. (16)

Making good
defects

SECOND. The owner shall operate the vessel for the United States, shall provide and pay for all provisions, (17) wages, bonuses, and consular shipping and discharging fees of the master, officers, and crew, and shall provide and (18) pay for all cabin, deck, engine room, and other necessary stores, and shall maintain the steamship in a thoroughly (19) efficient state in hull and machinery, tackle, apparel, furniture, and equipment during the service. If the service (20) requires any special equipment in addition to that required for the vessel's previous usual service, such equipment (21) shall be provided and paid for by the United States. The ordinary crew as required by law to operate the vessel (22) over-seas and in trans-Atlantic service shall be considered a full complement, and

Operation of
vessel, wages,
etc.

Special
equipment

Complement
of vessel

any extra men, such as wireless (23) operators, armed guards or others, not required by law for ordinary merchant over-seas and trans-Atlantic service, shall (24) be paid for by the United States. The owner shall, however, provide proper subsistence for such extra men at reason- (25) able rates to be fixed by the United States. (26)

Status of
vessel

THIRD. The vessel, while being so operated by the owner, shall not have the status of a Public Ship, and shall (27) be subject to all laws and regulations governing merchant vessels, and the owner shall take all proper steps to prevent (28) any suit or process from interfering with her service. (29)

When a Pub-
lic Ship

When, however, the requisitioned vessel is engaged in the service of the War or Navy Department, the vessel (30) shall have the status of a Public Ship, and although the owner shall continue to provide and pay for all the items (31) stated to be provided and paid for by the owner while operating the vessel as provided in clause "Second," the master, (32) officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties (33) of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control (34) of the United States. The owner, master, officers, and crew shall be notified of the commencement and termination (35) of the vessel's employment in the service of the War or Navy Department, and a proper notation shall be made on the (36) ship's Articles prior to the signing thereof, showing that the master, officers, and crew have entered into the service (37) of the United States. Monthly, or as soon as possible after the termination in a United States port of any voyage in the (38) service of the War or Navy Depart-

ment, the owner shall furnish the United States as a voucher a statement by the (39) United States Shipping Commissioner which shall certify the dates and amounts of the payment of the wages and (40) bonuses of the master, officers, and crew as the same appear on the completed Articles. (41)

FOURTH. So far as practicable, every member of ^{necessity of crew} the crew shall be an American citizen, citizens and subjects of (42) enemy or ally of enemy nations always excluded. Full list of crew, with their ratings and nationalities, shall, if (43) required, be produced to the United States at the time of delivery of the vessel or on the entry into the pay of the (44) vessel of such member or members of the crew. (45)

FIFTH. The United States shall provide and pay ^{United States will provide fuel, etc.} for all coals or other fuel, fresh water, port charges, pilotages, (46) agencies, commissions, brokerage, wharfage, and consular charges (except those pertaining to the master, officers, and (47) such part of the crew as the owner is responsible for under clause "Second"), and all other usual expenses paid by (48) charterer under so-called "Government Form Time Charter," except as otherwise provided. The United States shall (49) reimburse the owner for all income or excess profits taxes in foreign countries upon income or profits derived from (50) the vessel and accruing to the United States. (51)

SIXTH. The United States shall provide the necessary ^{Dunnage} dunnage and shifting boards, but the owner shall allow the (52) United States the use of dunnage and shifting boards already on board the

35

steamship, the United States to have the (53) privilege of using the shifting boards for dunnage, but making good any damage thereto. (54)

Fuel on delivery and re-delivery

SEVENTH. The United States shall accept and pay for all fuel on board at the time of delivery under the Requisition Order, and the owner shall on the re-delivery of the steamship pay for all fuel left on board, at the current (56) market price at the respective ports of delivery and re-delivery. A statement of such fuel shall be furnished forth- (57) with by the owner to the United States for verification. (58)

Payment of hire

EIGHTH. The United States shall pay for the use of the steamship at the monthly rate which shall from time to (59) time be established by the United States Shipping Board for a vessel of her description, commencing on and from (60) the hour that she shall be ready for delivery under the Requisition (and is so reported to the United States) and at and (61) after the same rate for any part of a month, hire to continue until the hour at which the vessel may be ready for re- (62) delivery at a United States port (and is so reported to the owner). (63)

If the United States Shipping Board shall hereafter lower the rate of hire from that in effect on the date of the (64) Requisition, the owner shall have the option of canceling this Requisition Charter as of the date of such reduction, (65) without prejudice to the rights of either party. (66)

Payment of hire shall be made in the District of Columbia, in cash, monthly, as earned, at the end of each calendar (67) month. If the vessel is lost, hire shall be paid up to and including the date of her loss (if the time of her loss be (68) uncertain,

then up to and including the date she is last heard from). (69)

Dead-weight tonnage shall be based on summer freeboard assigned or to be assigned with reference to North Atlantic (70) service, according to the standards of any recognized classification society; proper evidence of such assignment, (71) together with a true copy of the dead-weight scale of the vessel, shall, if possible, be furnished by the owner. Until (72) reasonable opportunity has been afforded the owner to procure such assignment, hire shall be paid on dead-weight (73) tonnage as certified by the owner; any excess or deficiency in such hire to be adjusted upon subsequent determination (74) of summer freeboard. (75)

NINTH. A certified statement from a recognized classification society that the vessel has been classed as fit for (76) her previous usual service shall, if obtainable at a reasonable cost, be furnished by the owner. Any alterations which (77) are made to obtain a class for North Atlantic service which are not required to obtain a class for the vessel's previous (78) usual service shall be made by and at the expense of the United States, but there shall be no deduction from the hire (79) for time consumed in making such alterations. So far as the exigencies of the service will permit, the owner shall do (80) all things necessary to maintain the vessel's class. (81)

TENTH. In addition to the aforesaid compensation for use of the steamship, the United States agrees to reimburse (82) the owner for any proper increases in wages and bonuses over the standard prevailing 1 August, 1917, for master, (83) officers,

and crew, the owner to produce satisfactory evidence of such increases in wages or bonuses. (84)

Inventory of
outfit

ELEVENTH. The United States shall have the use of all outfit, equipment, and appliances without extra cost, and (85) the same or their substantial equivalent shall be returned to the owner when the vessel is re-delivered in the same or (86) as good order and condition as when received, ordinary wear and tear and damage due to the operation of risks (87) assumed by the owner excepted. An inventory shall be furnished forthwith by the owner to the United States for (88) verification. (89)

Insurance of
vessel

TWELFTH. The owner shall assume the marine risks, including collision liabilities (excepting losses and liabilities (90) arising from war risks). The United States shall assume war risks (including collision liabilities), as excluded by (91) the following clause in the American Hull Policy, 1916 Form: "Warranted free of capture, seizure, arrest, restraint, (92) or detainment, or the consequences thereof, or of any attempt thereat (piracy excepted), and also from all consequences (93) of hostilities or warlike operations, whether before or after the declaration of war." (94)

When, however, the requisitioned vessel is used upon voyages different from those from which she has been taken (95) and for which she was intended, and by reason thereof the owner is compelled to pay an excessive premium in the (96) new service in which she is engaged as compared with other vessels in such service of approximately the same age, (97) class, and value, the facts may be shown to the United States Shipping Board, and if the facts are so found, the (98) United States will pay the excess premium, based upon value not

in excess of that on which the vessel has heretofore (99) usually been insured. The value thus insured shall not be deemed in any way indicative of the just compensation to (100) be paid in case of loss or damage due to the operation of risks assumed by the United States. (101)

The United States also shall pay additional premium (based upon value not in excess of that on which the vessel (102) has heretofore usually been insured) required for voyages outside the following warranties: (103)

- a. Warranted not to enter or sail from any port or ports, place or places in British North America on the Atlantic (104) coast, except Halifax, Louisburg, and Sydney, for purpose of coaling, arming, and compulsory examination (105) by the British Government, and not north of 50° north latitude on the Pacific coast. (106)
- b. Warranted not to enter the Baltic beyond 13° east longitude, or sail from a loading port therein between (107) October 1 and April 1. (108)
- c. Warranted not to sail for or from any port or place on the north coast of Europe between North Cape and (109) Cape Kanin, and not to proceed east of Cape Kanin in the Arctic Ocean. (110)
- d. Warranted not to sail with Indian coal as cargo between March 1 and June 30. (111)
- e. Warranted not to sail for or from any port or place in the Bering Sea or Alaska or

Siberia (except that vessels (112) may enter or sail from Vladivostok between May 1 and November 1). (113)

And if the vessel be seaworthy at the time of her delivery under the Requisition and at the commencement of the (114) voyage from the United States, but subsequently becomes unseaworthy so as to constitute a breach of marine insurance (115) warranty of seaworthiness, and such unseaworthiness be not due to or permitted to continue by the neglect of miscon- (116) duct of the owner or his agents, and loss or damage ensues which is proximately occasioned by such unseaworthiness, (117) the United States will assume such marine loss, in case the same shall be uncollectible, the extent of which shall be (118) ascertained as of the date of such loss or damage. The United States Shipping Board shall have the right to determine (119) finally any question of fact arising under this paragraph. (120)

Upon giving five days' written notice the United States may elect to assume all marine risks, including collision (121) liabilities. (122)

In the event and to the extent that the owner shall not be able to secure marine insurance from established insurance (123) companies, at rates considered reasonable by the United States Shipping Board, the United States shall assume the (124) marine risks, including collision liabilities, until such time as the owner shall be able to secure such insurance. (125)

Whenever the United States assumes the marine risks, including collision liabilities, or any part thereof, a deduc- (126) tion which in the opinion of the United States Shipping Board represents

a proper premium charge shall be made from (127) the monthly rate of hire. (128)

If the vessel shall be lost in a service where she may have been exposed to both war and marine risks, in the event (129) of there being no evidence as to whether loss is due to marine or war risk, it shall be presumed to be due to war risk. (130)

The owner shall insure against the usual protection and indemnity risks for the full protection of the owner and (131) the United States, the expense thereof to be borne 50 per cent by the owner and 50 per cent by the United States. (132)

THIRTEENTH. Except when the vessel becomes a ^{Insurance of} Public Ship, as provided in clause "Third", the owner must (133) provide and pay for all insurance on the master, officers, and crew, as required by law; provided, however, that the (134) United States shall reimburse the owner for all war-risk insurance, required by law, on the master, officers, and crew. (135)

FOURTEENTH. In case of loss or damage due to the operation of a risk assumed by the United States, just compen- ^{Compensation} (136) sation for such loss or damage, with interest at 6 per cent per annum, commencing 30 days after proof of such loss or (137) damage, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner (138) resorts to any court for the purpose of establishing the amount of the just compensation. The United States shall, how- ^{Option to} (139) ever, have the option (to be exercised substitute vessel within 90 days after the date of loss or constructive loss as provided in clause (140) "Fifteenth"), of delivering to the owner within a year after the

loss, in lieu of such payment, a vessel of substantially (141) similar tonnage, type, class, and value and of substantially no greater age (any deficiency in value to be paid for in (142) cash), paying interest in the meanwhile from the date of loss at the rate of 6 per cent per annum on the value of the lost (143) vessel. (144)

Constructive
total loss

FIFTEENTH. If the steamship sustains serious damage or other injury arising from the operation of a risk assumed (145) by the United States, to such extent that the United States shall, without regard to any rule of law, consider her a total (146) loss, the United States shall have the option (to be exercised within 90 days thereafter) of declaring the steamship to be (147) a total loss as of the date of the damage, and of taking over or selling her, and the owner's rights as to compensation (148) shall be the same as provided in clause "Fourteenth", interest to commence 30 days after proof of the damage. (149)

Space and
accommoda-
tions

SIXTEENTH. The whole reach of the vessel's holds, decks, and other places of loading and accommodations (not (150) to be loaded beyond what she can reasonably stow and carry) shall be at the disposal of the United States, reserving (151) only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel. (152)

Duties of
Master

SEVENTEENTH. The master shall prosecute his voyages with the utmost dispatch, shall render all customary assist- (153) ance with ship's crew and boats, and use all diligence in caring for ventilation of the cargo. The master shall be under (154)

the orders and directions of the United States or its nominees as regards employment or agency. The United States (155) shall load, stow, and trim the cargo at its own expense and risk under the supervision of the master, who is to have bills (156) of lading for cargoes signed as presented, without prejudice to any term or provision of this contract, and the United States (157) hereby agrees to indemnify the owner from all consequences or liabilities that may arise from the master's signing bills (158) of lading or otherwise complying with the orders and directions of the United States. (159)

EIGHTEENTH. The master shall obey all orders and instructions which he may receive from the United States or (160) from any of its nominees, and shall in all respects comply with any confidential instructions for masters which may (161) be issued by the United States, but he shall be the agent of the owner in all matters respecting the management, (162) handling, and navigation of the vessel, except when the vessel becomes a Public Ship or is otherwise subject to the (163) immediate orders of the United States in respect to such matters. (164)

Responsibility
for navigation

NINETEENTH. The United States shall furnish the master from time to time with all requisite instructions and (165) sailing directions, and he shall keep a full and complete log of each voyage, which is to be patent to the United States (166) at any time. (167)

Sailing
directions

TWENTIETH. If the United States shall have reason to be dissatisfied with the conduct of the master, officers, (168) or any member of the crew,

Complaints

the owner shall, on receiving particulars of complaint, investigate the same, and if necessary make a change in the appointments. In case of an emergency not permitting of such complaint and investigation, (169) the United States shall have power to remove the master, officers, or any member of the crew and to appoint others in (171) their places, but if possible the owner shall be consulted in the making of such appointments. (172)

Supercargo

TWENTY-FIRST. The United States may appoint a representative to accompany the steamship, who shall be furnished, free of charge, with first-class accommodations, if space permits, and the same fare as provided at the captain's (174) table. (175)

Lapse of hire

TWENTY-SECOND. In the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, collision, dry-docking for the purpose of examining or painting underwater parts or making any repairs, or from any (177) other cause preventing the work of the vessel for more than 24 consecutive hours, the hire shall be reduced one- (178) half until the vessel be again in an efficient state to resume her service; provided, however, that in case of loss of time (179) in a port in the war zone, or at sea, due to any such cause, no such reduction shall be made if the owner shall show (180) that he used due diligence to avoid such loss of time. Provided further, that there shall be no reduction of hire on (181) account of loss of time arising from a war risk. Should the vessel be driven into port or anchorage by stress of weather, (182) or from any accident to cargo, detention or loss of time occasioned thereby

shall not be the cause for any cessation or (183) reduction of hire. In any case of loss of time for which no reduction of hire is made, credit shall be given to the United (184) States for any expenses saved by the owner during such time. (185)

TWENTY-THIRD. The steamship shall be dry-^{Dry-docking} docked and her bottom cleaned and painted in the United States (186) whenever the United States and the master think necessary, but at least once in each eight months, provided the ex- (187) gency permits. (188)

TWENTY-FOURTH. Throughout the period of serv-^{Limitation of} ice under this "Time Form" losses or damages aris-^{liability} ing or occa- (189) sioned by the following causes shall be always excepted, viz, the act of God, perils of the seas, fire on board, in hull, (190) craft, or on shore, barratry of the master or crew, enemies, pirates, robbers or thieves, arrests and restraints of princes, (191) rulers, and peoples, collisions and strandings, explosions, bursting of boilers, breakage of shafts, or any latent defect (192) (even if existing at the beginning of the voyage) but not discoverable by due diligence, in the hull, boilers, machin- (193) ery, or appurtenances, negligence, default, or error in judgment of the pilot, master, or crew, or other servants of the (194) owner, in the management or navigation of the steamship. (195)

This "Time Form" is subject to all the terms and provisions of and any or all the exemptions from liability con- (196) tained in the act of Congress approved 13 February, 1893. (197)

TWENTY-FIFTH. The owner shall provide gear for ^{Gear Lights} all ship's derricks, and shall maintain the gear of

the vessel as (198) fitted. The owner shall provide oil and lanterns for night work or vessel shall give use of electric lights when fitted (199) therewith. The owner shall provide ropes, falls, slings, and blocks necessary to handle ordinary cargo up to 3 tons in (200) weight, but at the expense of the United States. (201)

Day and night
work

TWENTY-SIXTH. The vessel shall work day and night, as required, and the steam winches shall be at the service (202) of the United States by day and night, with full steam; whenever possible without additional expense to the owner, (203) same to be worked free of cost by the crew. The United States shall reimburse the owner for all overtime, provided (204) the same be certified by the agent or nominee of the United States; or, if no agent is present, by the master, at such (205) standard rates as may be in force from time to time. (206)

Overtime

Alterations
and vessels
condition on
re-delivery

TWENTY-SEVENTH. The United States may at any time remove or alter, at its expense, all or any of the fittings of (207) the vessel, and may erect any new fittings which may be required to render the vessel available for service to the United (208) States, provided that she shall, at the cost of the United States, be re-delivered to the owner in the same or as good (209) order and condition as that in which she was when delivered to the United States, ordinary wear and tear and damage (210) due to the operation of risks assumed by the owner excepted, or just compensation for the damage thus occasioned (211) to the vessel, with interest at 6 per centum per annum commencing 30 days after the proof of such damage upon (312) re-delivery of the vessel, shall be

paid by the United States, in the District of Columbia, interest not to be paid, how- (213) ever, if the owner resorts to any court for the purpose of establishing the amount of the just compensation. (214)

TWENTY-EIGHTH. All derelicts and salvage shall ^{Salvage} be for the equal benefit of the United States and the owner, (215) after deducting all expenses incident thereto and the proportion due to the master, officers, and crew. (216)

TWENTY-NINTH. General average, if incurred, ^{General average} shall be settled at New York according to York-Antwerp Rules of (217) 1890 and Antwerp Rule of 1903, and as to matters not covered thereby according to the customs and practice of the (218) port of New York. (219)

THIRTIETH. The United States shall have a lien ^{Lien} on the vessel for all moneys paid and not earned or due to the owner (220) and for all advantages and overpayments made, and the United States shall have a lien on all cargoes and goods for the (221) payment of freights and charges, including dead freight, demurrage, forwarding charges for carriage to port of (222) shipment, and for general average claims. (223)

THIRTY-FIRST. No Member of or Delegate to Congress, or Resident Commissioner, nor any person employed by the (224) United States Shipping Board is or shall be admitted to any share or part of this contract, or to any benefit which (225) may arise therefrom, but under provisions of section 116 of the act of Congress approved 4 March,

1909, this stipu- (226) lation, so far as it relates to Members of or Delegates to Congress, or Resident Commissioners, shall not extend (227) or be construed to extend to any contract made with an incorporated company for its general benefit. (228)

Arbitration

THIRTY-SECOND. Any dispute of law or fact arising under this "Time Form," except as to the rate of hire and the (229) compensation for actual or constructive total loss of the vessel, and except as to matters expressly left to be decided by (230) the United States Shipping Board, shall be referred to the arbitration of three persons, one appointed by the owner, one (231) by the United States, and the third by the two so chosen. They may proceed in any manner determined by themselves, (232) and their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award hereunder the (233) agreement may be made a rule of court. Such arbitration shall be a condition precedent to the commencement of any (234) action. (235)

SPECIAL CLAUSES—PASSENGER SHIPS.

THIRTY-THIRD. The owner of a passenger vessel shall permit the use, without extra cost therefor, of all cooking (236) utensils and facilities already aboard the vessel, provided the same or their substantial equivalent be re-delivered to (237) the owner in the same or as good order and condition as when received, ordinary wear and tear and damage due to the (238) operation of risks assumed by the owner excepted. An inventory of such property shall be furnished forthwith by (239) the owner to the United States for verification. (240)

THIRTY-FOURTH. The owner of a passenger vessel, if requested by the United States, whenever passengers are (241) on board the vessel, shall operate and maintain the saloon mess, for which the owner shall be compensated at reasonable (242) rates to be fixed by the United States. (243)

THIRTY-FIFTH. The owner of a passenger vessel, if requested by the United States, shall operate and maintain a (244) troop mess, in which the meals served shall be the equivalent of the authorized United States Army garrison ration, (245) and for which the owner shall be compensated at reasonable rates to be fixed by the United States. (246)

THIRTY-SIXTH. Whenever passengers are carried (troops or others) the United States shall receive all the earnings (247) therefrom, and pay all expenses incidental thereto which are not assumed by the owner under the other provisions (248) of this "Time Form," including repairs and upkeep of fittings (subject to ordinary wear and tear but not breakage (249)), and shall also furnish any additions it may require; or, in the alternative, shall make a special arrangement with (250) the owner on a per head basis. (251)

SPECIAL CLAUSES—TANKERS.

THIRTY-SEVENTH. The owner guarantees that the tanks are oil tight at the time of delivery and shall take every (252) precaution to maintain them in this condition during the service, but shall not be responsible for leakage. (253)

Tanks to be oil tight

THIRTY-EIGHTH. The owner shall facilitate the discharge of oil fuel to such ships as the United

States shall direct, (254) and shall provide a Y piece with necessary reducers for each discharge up to the maximum number which can be used (255) simultaneously. (256)

BARE BOAT FORM.

Period of
service

Vessel to be
completely
equipped
and fit

FIRST. The steamship shall remain in the service of the United States under the Requisition Order to be employed (1) as and where the United States may from time to time determine and for such period of time as the United States (2) may determine, but such period shall not extend beyond the first arrival of the steamship in an American port six (3) months after peace is declared, unless she shall be required for Government purposes. The vessel, when placed at (4) the disposal of the United States, as directed by it, shall be or shall forthwith be made at the expense of the owner (5) tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, outfitted, and equipped, and in every (6) respect seaworthy and in good running order and condition, and shall be fit for the service in which she has usually (7) been employed, having on her delivery United States Inspection Certificate that the steamship has met all requirements (8) to fit her for the trade in which she is employed at the time of the Requisition, except that no such certificate shall be (9) required if she be a foreign-built vessel not at present subject to the United States Steamboat Inspection laws as provided (10) in the Panama Canal Act, as amended 18 August, 1914. Any de-

iciency in these respects must be remedied forth-^{Making good defects} with (11) at the expense of the owner; and any time lost in remedying such deficiency is not to be paid for by the United (12) States (13).

SECOND. The United States, at its sole expense,^{Operation} shall man, operate, victual, and supply the vessel. (14)

THIRD. The United States shall pay all port^{Port charges} charges, pilotages, and all other costs and expenses incident to the use (15) and operation of the vessel. (16)

FOURTH. The United States shall assume war,^{War and marine risks} marine, and all other risks of whatsoever nature or kind, including (17) all risk of liability for damage occasioned to other vessels, persons, or property. (18)

FIFTH. The United States shall pay for the use^{Payment of hire} of the steamship at the monthly rate which shall from time to time (19) be established by the United States Shipping Board for a vessel of her description, commencing on and from the hour (20) when she shall be ready for delivery under the Requisition (and is so reported to the United States) and at and after the (21) same rate for any part of a month, hire to continue until the hour at which the vessel may be ready for re-delivery at (22) a United States port (and is so reported to the owner). (23)

If the United States Shipping Board shall hereafter lower the rate of hire from that in effect on 15 October, 1917, (24) the owner shall have the option of canceling this Requisition Charter as of

the date of such reduction, without prejudice (25) to the rights of either party. (26)

Payment of the hire shall be made in the District of Columbia, in cash, monthly, as earned, at the end of each (27) calendar month. If the vessel is lost, hire shall be paid up to and including the date of her loss (if the time of her (28) loss be uncertain, then up to and including the date she is last heard from). (29)

Dead-weight
tonnage

Dead-weight tonnage shall be based on summer freeboard assigned or to be assigned with reference to North Atlantic (30) service, according to the standards of any recognized classification society; proper evidence of such assignment, (31) together with a true copy of the dead-weight scale of the vessel, shall, if possible, be furnished by the owner. Until (32) reasonable opportunity has been afforded the owner to procure such assignment, hire shall be paid on dead-weight (33) tonnage as certified by the owner, any excess or deficiency in such hire to be adjusted upon subsequent determination (34) of summer freeboard. (35)

Classification

SIXTH. A certified statement from a recognized classification society that the vessel has been classed as fit for (36) her usual previous service shall, if obtainable at a reasonable cost, be furnished by the owner. Any alterations which (37) are made to obtain a class for North Atlantic service which are not required to obtain a class for the vessel's previous (38) usual service shall be made by and at the expense of the United States, but there shall be no deduction from the (39) hire for time consumed in making such alterations. So far as the exigencies of the service will permit, the United (40) States shall do all things necessary to maintain the vessel's class. (41)

SEVENTH. The United States shall accept and Fuel and stores pay for all fuel and consumable stores in good order and (42) condition on board at the time of vessel's delivery under the Requisition Order, and the owner shall, on re-delivery, (43) pay for all such supplies left on board, at the current market price at the respective ports of delivery and re-delivery. (44) An inventory of all such supplies shall be furnished forthwith by the owner to the United States for verification. (45)

EIGHTH. The United States shall have the use Outfit and equipment of all outfit, equipment, and appliances without extra cost, provided (46) same or their substantial equivalent shall be returned to the owner when the vessel is re-delivered in the same (47) or as good order and condition as when received, ordinary wear and tear excepted. An inventory of such property (48) shall be furnished forthwith by the owner to the United States for verification. (49)

NINTH. In case of actual or constructive loss as Compensation in event of loss or damage provided in clause "Tenth" due to the operation of a risk (50) assumed by the United States, just compensation for such loss, with interest at 6 per centum per annum, commencing (51) 30 days after the date of such loss, shall be paid by the United States in the District of Columbia, interest not to be (52) paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation. The (53) United States shall, however, have the option (to be exercised within 90 days after the date of such actual or con- (54) structive loss) of delivering to the owner within a year after such loss, in lieu of such payment, a vessel of substantially (55) similar ton-

nage, type, class, and value, and of substantially no greater age (any deficiency in value to be paid for in cash), (56) paying interest in the meanwhile from the date of loss at the rate of 6 per centum per annum on the value of the lost vessel. (57)

In case of damage (not constituting an actual or constructive loss) due to the operation of a risk assumed by (58) the United States, the vessel shall, at the cost of the United States, be restored to the owner at the expiration of her (59) service under the Requisition, in the same or as good order and condition as that in which she was when delivered to (60) the United States, ordinary wear and tear excepted, or, just compensation for the damage, with interest at 6 per centum (61) per annum, commencing 30 days after proof of such damage upon re-delivery of the vessel, shall be paid by the United (62) States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose (63) of establishing the amount of the just compensation. (64)

Constructive
total loss

TENTH. If the steamship sustains serious damage or other injury to the extent that the United States shall, with- (65) out regard to any rule of law, consider her a total loss, the United States shall have the option (to be exercised within (66) 90 days thereafter) of declaring the steamship to be a total loss as of the date of the damage, and of taking over or selling (67) her, and the owner's rights as to compensation shall be the same as provided in clause "Ninth," interest to commence (68) 30 days after the date of the damage. (69)

Alterations
and vessel's
condition on
re-delivery

ELEVENTH. The United States may at any time remove or alter, at its expense, all or any of the fittings of the (70) vessel, and may erect any new

fittings which may be required to render the vessel available for service to the United (71) States, provided that the vessel shall, at the cost of the United States, be restored to the owner at the expiration of her (72) service under the Requisition in the same or as good order and condition as that in which she was when delivered to (73) the United States, ordinary wear and tear excepted, or just compensation for the damage thus occasioned to the vessel, (74) with interest at 6 per centum per annum, commencing 30 days after the proof of such damage upon re-delivery of the (75) vessel, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner (76) resorts to any court for the purpose of establishing the amount of the just compensation. (77)

TWELFTH. The United States shall have a lien Lien on the vessel for all moneys paid and not earned or due to the owner (78) and for all advances and overpayments made, and the United States shall have a lien on all cargoes and goods for the (79) payment of freights and charges, including dead freight, demurrage, forwarding charges, charges for carriage to port of (80) shipment, and for general average claims. (81)

THIRTEENTH. Any dispute of law or fact arising Arbitration under this "Bare Boat Form," except as to the rate of hire and the (82) compensation for actual or constructive total loss of the vessel and except as to matters expressly left to be decided (83) by the United States Shipping Board, shall be referred to the arbitration of three persons, one appointed by the owner, (84) one by the United States, and the

third by the two so chosen. They may proceed in any manner determined by them- (85) selves, and their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award here- (86) under the agreement may be made a rule of court. Such arbitration shall be a condition precedent to the commence- (87) ment of any action. (88)

FOURTEENTH. No Member of or Delegate to Congress or Resident Commissioner, nor any person employed by the (89) United States Shipping Board, is or shall be admitted to any share or part of this contract, or to any benefit which (90) may arise therefrom, but under the provisions of section 116 of the act of Congress approved 4 March, 1909, this (91) stipulation, so far as it relates to Members of or Delegates to Congress or Resident Commissioners, shall not extend or (92) be construed to extend to any contract made with an incorporated company for its general benefit. (93)

SPECIAL CLAUSE—PASSENGER SHIP.

FIFTEENTH. The owner of a passenger vessel shall permit the use, without extra cost therefor, of all cooking uten- (94) sils and facilities already aboard the vessel, provided the same or their substantial equivalent be returned to the (95) owner when the vessel is re-delivered in as good order and condition as when received, ordinary wear and tear ex- (96) cepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification. (97)

SPECIAL CLAUSES—TANKERS.

SIXTEENTH. The owner guarantees that the tanks are oil tight at the time of delivery. (98)

Tanks to be
oil-tight

SEVENTEENTH. To facilitate the discharge of oil ^{Gum} fuel, the owner shall provide a Y piece with necessary reducers for (99) each discharge up to the maximum number which can be used simultaneously. (100)

TREASURY DEPARTMENT

UNITED STATES CUSTOMS SERVICE

NEW YORK

[VIGNETTE]

OFFICE OF THE COLLECTOR

District No. 10

Address all communications for this office
to the Collector of Customs

New York, N. Y.

In reply refer to

TO WHOM IT MAY CONCERN:

THIS IS TO CERTIFY that it appears from the records of this office that the British Steamship "GLENEDEN", Muir, master, was entered at this port from Bordeaux, France, on November 18th, 1918.

Further that said vessel was in ballast having no cargo on board.

Given under my hand and
the seal of this office
this 2nd day of January
1919.

[SEAL]

JOHN FARRELL
Deputy Collector.

Fee 20¢

F Y

#8309

**Judge Morton's Opinion in The Lake
Monroe.**

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MASSACHUSETTS.

No. 1666 Civil.

JOHN J. MATHESON *et al.*

VS.

S.S. LAKE MUNROE.

MEMORANDUM OF DECISION ON MOTION
FOR PROCESS.

(29 November 1918)

MORTON, J. Before the United States entered the war the Act of 7 September 1916 was passed which established the United States Shipping Board and authorized it to construct, charter and operate commercial vessels and to form if advisable subsidiary corporations to carry out its powers. (United States Compiled Statutes 1916 Sec. 8146 *a et seq.*). Under this statute (section 11) the Emergency Fleet Corporation was organized under the laws of the District of Columbia. After this country became a belligerent the Act of 15 June 1917 was passed (United States Compiled Statutes Sup. 1917, Sec. 3115 1/16 d) which conferred upon the President extraordinary powers in reference to shipping, and *inter alia* authorized him to requisition uncompleted vessels and to complete them.

By a proclamation dated 11 July 1917 the President delegated to the Emergency Fleet Corporation his powers under the Act last referred to so far as they related to the construction of vessels, and to the United States Shipping Board his powers (speaking very generally) in respect to the operation of vessels.

At the time when this proclamation was made the *Lake Monroe* was in process of construction for private parties. She was requisitioned by the Emergency Fleet Corporation and completed by it. Upon her completion she was delivered to the United States Shipping Board to be operated by it. The Shipping Board caused her to be registered in the name of the United States and afterward caused her to be operated through the Emergency Fleet Corporation. This corporation employed the Kerr Steamship Company or Randall & Co. as its agents to attend to the business details of said operation. The Shipping Control Committee, one of the administrative bodies of the United States Shipping Board, ordered the *Lake Monroe* into the coal trade for New England. She carried coal from Lamberts Point, Va., to New England ports under agreements whereby the shippers paid a stipulated rate per ton for the transportation.

While she was so engaged she collided with and damaged (as is alleged) the fishing schooner *Helena*. The master of the *Helena* thereupon filed a libel in this court and prayed for a warrant of arrest against the *Lake Monroe*. The United States Attorney suggested to the court that the *Lake Monroe* was a government vessel and was exempt from arrest. There was a hearing on the prayer for process in the libel; and counsel for the Shipping Board were heard in opposition thereto.

I have no doubt that the *Lake Monroe* is a government vessel and as such would be exempt from arrest except for the provisions of Section 9 of the Shipping Board Act (United States Compiled Statutes 1916, Sec. 8146 e). *The Broadmayne*, 85 L. J. R. Prob. Ad. & Div. 153 (1916); *The Scotia*, 1 A. C. 501 (1903).

The case therefore turns on the provisions of Section 9 (*supra*). This section explicitly says that vessels of the Shipping Board may be registered as vessels of the United States, and shall be entitled to the benefits and privileges appertaining to such registry. It further provides that "Such vessels while employed solely as merchant vessels shall be subject to the laws, regulations and liabilities governing merchant vessels whether the United States be interested therein as owner in whole or in part or hold any mortgage, lien or other interest therein." The expression "or liabilities governing merchant vessels" is clearly broad enough to include arrest on process *in rem*. It seems clear that as to vessels acquired by the Shipping Board under the Act of 1916, the liability here asserted by the libellant exists.

The ultimate question then is whether vessels acquired under the Act of 1917 and the presidential proclamation in pursuance thereof stand differently in this particular from vessels acquired under the Act of 1916. The parties agree that vessels acquired under the earlier Act are used on the same sort of work as vessels acquired under the later one and that the distinction suggested is not recognized in actual operation. It seems to me that the President, in delegating his powers under the Act of 1917 to the bodies organized and existing under the previous Act, intended that the ships requisitioned

under the later Act should be added to those being operated or controlled under the former one that that there should be a single fleet of government controlled vessels operated by the same instrumentalities and subject to the same liabilities; and I have no doubt that he had power so to deal with the matter.

Moreover the question presented in this case has already been decided in the Southern District of New York in favor of the right to arrest. (*The Florence H.*, 248 F. R. 1012). It would be extremely unfortunate to have a divergence of opinion between the two districts on a question of this character.

Prayer for warrant granted.

**Judge Bellstab's Opinion in The
Roserie.**

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

MCALLISTER LIGHTERAGE LINE,
INC.,

Libelant,

v.

BRITISH STEAMSHIP ROSERIC.

IN ADMIRALTY.

On suggestion
that the writ of ar-
rest be quashed or
that the suit be
stayed. Suit stayed.

A vessel belonging to private owners, requisitioned by the British Government and employed by it in the Public Service is immune from arrest under Admiralty process while in such Government service. It is immaterial that the officers and crew continue in the employment of the private owners and actually operate the vessel. The officers and crew, as well as the ship, become for the time being the sovereign's instrumentalities and their possession is the sovereign's possession. In such a case the immunity depends, not upon the ownership or exclusive possession of the instrumentality by the sovereign, but upon its appropriation and devotion to the public service.

The immunity of such vessels arises, not from lack of judicial power, but from the implied consent of one sovereignty to waive jurisdiction over the public instrumentalities of another. This principle, which obtains whenever the two sovereigns

are in a state of mutual peace and amity, applies with especial force when they are actively engaged as co-belligerents in prosecuting a war against a common enemy.

It is within the discretion of the Court to receive a suggestion from the official representatives of a foreign sovereign appearing by counsel as *amici curiæ* and such suggestion is conclusive as to all its material statements of fact.

It is immaterial that the vessel was released upon an undertaking by the owners to bond her in case the Court should hold that she was not immune from process. For the purposes of this decision the steamship must be regarded as still subject to, or threatened with, process of arrest.

While full immunity is to be accorded the British Government in the use of the vessel while under requisition, it is not necessary to quash the writ of arrest and thus dismiss the suit. It is sufficient to enter a decree staying all proceedings to arrest or detain the vessel so long as she continues in the service of the British Government.

VREDENBURGH, WALL & CAREY; BURLINGHAM,
VEEDER, MASTEN & FEAREY, Proctors for
Libelant.

FREDERIC R. COUDERT, HOWARD THAYER
KINGSBURY, as *amici curiæ*, Counsel for
the British Embassy.

JOHN M. WOLLSEY, appearing specially for the
Steamship *Roseric*.

OPINION.

RELLSTAB, District Judge.

The libel alleges that on April 16, 1918, the Steamship *Roseric* negligently collided with libel-

ant's barge *McAllister Bros.*, No. 63, in New York Harbor, to its damage. After seizure by the Marshal, within the territorial jurisdiction of this court, the steamship was released by the order of libellant upon an undertaking by the owner to bond her, in case the court should hold that she was not immune from process, on grounds to be urged on behalf of the British Ambassador. Thereupon counsel for the British Embassy, appearing by leave of court as *amici curiæ*, filed a suggestion in the following terms:

"1. The said *Roseric* is in the service of the British Government as an Admiralty transport by virtue of a requisition from the Lords Commissioners of the Admiralty and is engaged in the business of the British Government and under its direction and control;

"2. Any interruption of the voyage of said vessel by arrest or other process will interfere with the Government business upon which said vessel is engaged and thereby with the efficient prosecution of the present war;

"3. This court should not exercise jurisdiction over a vessel in the service of a co-belligerent foreign Government;

"4. The British Courts have refused to exercise jurisdiction over vessels in Government service, whether of the British Government or of allied Governments, and by comity the Courts of the United States should, in like manner, decline to exercise jurisdiction over vessels in the service of the British Government;

"5. The questions involved in this cause are of great importance to the British Government by reason of the large number of vessels in the service of the British Government which enter ports of the United States and of the important relation borne by the Government service performed by these vessels to the efficient prosecution of the present war;

"And, upon such suggestion, for leave to represent to this honorable Court as such *amici curiæ* that the said writ of arrest should be quashed and dissolved in so far as it runs against the said Steamship *Roseric*, and that all proceedings to arrest or detain the said Steamship *Roseric* under said writ or otherwise, should be stayed so long as said Steamship *Roseric* remains in the service of the British Government as aforesaid."

From this suggestion and the deposition of the ship's master, which was not offered in evidence but produced for the information of the court, it appears, that while the steamship is owned by a British subject and its navigation in charge of the owner's officers and crew, who receive their compensation from such owner, it, as well as the officers and crew, is under the complete control of the British Government, and is engaged in its business as an admiralty transport, carrying such cargo, and going to and from such ports as that Government directs. For the time being it is appropriated by the British Government for its public use, and was when the collision occurred and the arrest was made.

On the face of the libel, the libellant, an American citizen, has an inchoate lien on the ship, and this court *prima facie* jurisdiction to perfect it. If the arrest is set aside and the writ quashed, the libellant has no present remedy but in the British courts. If the proceedings to arrest the ship are stayed for as long as it remains in the service of the British Government, the libellant's rights will be seriously prejudiced, and in the end may find itself remediless.

On the other hand, if the right to arrest this ship, so requisitioned, is sustained, the sovereign

rights of the British Government, at a time when it is engaged in a war, will be subordinated to those of a private claimant. Furthermore, the right to seize one ship so requisitioned means the right to seize any number of ships similarly conditioned, with the result that during the continuance of the war, not only that Government, but the United States and other sovereignties, co-belligerents in prosecuting such war against the common enemy, will be seriously hampered in their joint struggle to maintain their sovereign rights. It is of no moment that in this case, by arrangement between the proctors of the libellant and the ship's owner, no prejudicial detention of the ship resulted. The right to arrest involves the right to detain; detention includes the probability of loss to the users of the vessel; and exemption from delay of a vessel engaged exclusively in the public service of a nation is as much the privilege of sovereignty as the vessel's exemption from final condemnation. For present purposes the steamship must be regarded as still subject to or threatened with process of arrest. *The Florence H*, 248 F. 1012.

Libellant asserts that "if this Court drops or stays its jurisdiction that must be done for reasons which our Courts have declared to be not well-founded," and that to grant such immunity would go "far beyond the principles which have been laid down by our courts as determining whether a ship shall be immune from process."

In *The Exchange*, 11 U. S. (7 Cranch.) 116, a pioneer in this field of judicial inquiry, it was held that

"A public vessel of war of a foreign sovereign at peace with the United States, coming

into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country."

In that case libelant, an American citizen, asserted title to a vessel found within the waters of the United States and in the possession of the French Government which had converted it into a war vessel. Chief Justice Marshall, speaking for the court, after premising that all sovereignties possess equal rights and equal independence, declared that, as a result of mutual intercourse, impelled by a common interest, they "have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers," and that such jurisdiction "would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects."

After dealing with the admitted exemptions of the persons of a sovereign, his ambassadors, and the passage of his armies under certain circumstances, from interference by the sovereign of the territory into which they had been permitted to enter, the learned Chief Justice said:

"That all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it, must be supposed to act" (p. 143).

After pointing out the difference in the status of a private individual and a merchant ship on the one hand and a public armed ship on the other

hand, of one nation coming into the territory of another, with reference to amenability to the latter's jurisdiction, and that the foreign sovereign could have no motive for the former's exemption from such jurisdiction, he, referring to the foreign sovereign's attitude to the public armed ship, said:

"She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place, without affecting his power and his dignity. The implied license, therefor, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality" (p. 143).

The *Exchange* is a strong case, but it has always been accepted as law both here and abroad. There the allegation was that libelants had been wrongfully dispossessed of their vessel by the representatives of a foreign sovereign. The inconvenience or possible injustice that may happen to the libelant in the instant case, if the *Roseric* is held immune from arrest, is incomparable with that apparently sustained by the libelant in the cited case.

The immunity there accorded was not due to a lack of judicial power. The power was assumed, but its exercise was waived out of a due regard for the dignity and independence of a sister sovereignty with whom this nation was at peace. The implication is that to insist upon jurisdiction in such instances likely would be considered by the foreign

sovereign as a reflection upon its dignity and an interference with its independence, and would tend to strain and possibly disrupt amicable relations.

Though in *The Exchange* an armed ship of war was the subject before the court, there is nothing in the reasoning resulting in its exemption from judicial process, that limited the immunity to that character of vessels. The privilege was based on the idea that the sovereign's property devoted to state purposes is free and exempt from all judicial process to enforce private claims. Such idea is as cogently applicable to an unarmed vessel employed by the sovereign in the public service as it is to one of his battleships. The exemption declared in that case was considered in *The Santissima Trinidad*, 20 U. S. (7 Wheat.) 283, and Mr. Justice Story, who sat in the *Exchange*, in stating the grounds thereof, referred to them as applicable to foreign public ships (p. 3530).

In *Briggs et al. v. Light-boats*, 93 Mass. (11 Allen) 157, Justice Gray, in answering the contention that these light-boats, though owned by the United States, were not intended for military service, and, therefore were subject to judicial process, stated the ground of exemption as follows:

"That immunity from such interference arises, not because they are instruments of war, but because they are instrument of sovereignty; and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted" (p. 165).

In granting immunity to property devoted by a sovereign to public use, neither its ownership nor the particular public use made of it is treated as important in the British courts.

In *The Parlement Belge*, L. R. 5 P. D. 197, im-

munity was accorded to an unarmed vessel belonging to a foreign sovereign in the hands of officers commissioned by him and employed in carrying mails, though it also carried merchandise and passengers for hire. In that case Brett, *L. J.*, after reviewing the American and other cases, said:

"That as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its course, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction" (p. 217).

In *The Broadmayne*, *L. R. (C. A. 1916) 64*, the immunity was extended to a ship owned by private parties, while under requisition by the British Admiralty, in an action for salvage. This exemption was granted in spite of the urgings of plaintiff's counsel (being similar to those pressed here),

"that the effect of requisitioning a ship is not to change the ownership, and the ship requisitioned remains the property of the owners notwithstanding the requisitioning, and that when the use of the ship by the Crown ceases the ship is restored to her owners" (p. 70).

Swinfen Eady, *L. J.*, in reply to such insistence, said:

"That is so, but it does not prevent a ship so long as she remains under requisition being in the service of the Crown, and as such exempt from process of arrest" (p. 70).

In *The Messicano*, 32 T. L. R. 519, a vessel requisitioned by the Italian Government from private owners and carrying war material for that Government, was held to have the same privilege from arrest in a collision case as a ship requisitioned by the British Government.

In *The Errises*, reported in Lloyd's List, October 24, 1917, pages 5-8, a vessel owned by Greek subjects, and which, by arrangement between the Greek and British Governments, had been requisitioned for the use of the British and Italian Governments, and was carrying coal for the latter, was held free from arrest or detention "so long as the ship shall remain in the service of either the Italian or the British Government for public or State purposes."

These cases, in my judgment, must be accepted as declaring the judicial policy to exercise no jurisdiction over a sovereign, whether local or foreign, or over instrumentalities employed by it in the public service, by any proceedings *in intitu*, regardless of the form or character of the process. The libellant, however, insists that *The Johnson Lighterage Co.*, No. 24, 231 F. 365 and *The Attualita* (C. C. A. 4) 238 F. 909 announce a different rule and control the instant case. The Johnson Lighterage Company case (decided by this court) was a proceeding to recover for salvage services. Both cargo and vessel were seized. On an order to show cause why such cargo (munitions of war) should not be released from seizure and turned over to the Russian Government who was the owner thereof, it was held that as the possession of the cargo at the time of its seizure was not in that Government but in the charterer of the vessel, under a contract for transportation, it was within the

exception declared in *The Davis*, 77 U. S. (10 Wall.) 15 and subject to arrest. The lack of actual possession of the property by the government at the time of seizure is the basis of the exception established by the *Davis* case and distinguishes both it and the *Lighterage* case from the case at bar.

The contention of libellant that as the ship's officers and crew operated the *Roseric*, she was within the exception established by those cases is not tenable. The British Government, in the exercise of its sovereign powers, took the *Roseric* and devoted it to its own purposes. That no change in the officers and crew took place, and that they continued in the employment of the ship's owner is unimportant. The ship, its owner, officers and crew were under the compulsion of sovereignty.

While the fact that the operation of the ship was by the owner's officers and crew may be important on the question of the owner's present and the ship's ultimate liability for the negligence charged in the libel, it is immaterial upon the question of the right of a private individual to enforce such liability by seizing the ship while it remains appropriated to the sovereign's public use. Whether the Government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination.

The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being, became the sovereign's instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force.

In legal effect a ship so subjected to *vis major*

is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy. In *The Davis*, with reference to the goods there in question, the court found that the United States was not in the position of a charterer of the vessel, but that "the case was the usual one of a common carrier contracting to deliver goods on his own responsibility," and that "The possession of the master of the vessel was not the possession of the United States. He was in no sense an officer of the government. He was acting for himself, under a contract which placed the property in his possession and exclusive control of the voyage" (pp. 21 and 22).

The Attualita (C. C. A. 4) 238 F. 909 is more in point. In that case, notwithstanding the ship had been requisitioned by the Italian Government and was engaged in its public service, it was held subject to arrest in a proceeding *in rem* to recover damages for an alleged tort. That case was decided before this country became a co-belligerent with the Italian Government in the war against Germany. In all other respects the facts of that case are seemingly identical with those of the case at bar. The District Court had held that the ship was immune from arrest, basing its decision on the ground of international comity. The Circuit Court of Appeals, observing that to allow the immunity would require it to go beyond any of the decided cases, said:

"There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is in any way responsible."

And after referring to the immunity granted to the diplomatic representatives and the vessels or

other property in the possession and control of a sovereignty, it said that such immunity

"can be safely accorded, because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare."

That the seizure of the vessel interfered with sovereignty's rights and deprived it of the use of the ship, unless and until it or the owner thereof submitted to the court's jurisdiction (by bonding, etc.), was not referred to.

So far as the suggested irresponsibility of any one for a tort committed in the operation of a vessel so requisitioned is concerned, it should not be overlooked that the owner could be made personally liable for the negligence of his servants in operating the ship, even though the ship should be exempt; and so far as the ship itself is concerned, the immunity need not be extended beyond the period of the sovereign's requisition. For, as soon as the sovereign restores the ship to the owner, the reason for its immunity is gone.

It seems to me, and I state my judgment with deference, that the decision in that case unduly subordinates the right of sovereignty to those of the individual. The immunity of the sovereign's instrumentalities devoted to public service from the process of its own courts, as I understand the previous cases, is not based upon the idea that it may be "safely accorded," but on account of its dignity and independence and because it is necessary for the well being of the nation that it serves, that it shall not be hampered or interfered with in the use of such instrumentalities.

In the case of the courts of one sovereignty waiving jurisdiction over another sovereignty's instrumentalities, the thought of safety to private litigants, to my mind, is at least equally irrelevant. The immunity in such cases, as already noted, is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for such rights, and to maintain and further amicable relations among them, it is, by tacit agreement, recognized as needful, in certain particulars, that one sovereign should decline to exercise some of its prerogatives when to exercise them would necessarily place another sovereign in a subordinate position.

In line with this thought, the following language of Judge Thompson in *The Luigi*, 230 F. 495, is pertinent:

"It is far more important for the courts of the United States to recognize the international rule of comity that an independent sovereign cannot be personally sued, because such a suit would be inconsistent with the independence and equality among the nations of the state which he represents, than it is to take cognizance of private rights, if, by so doing, that rule is violated" (p. 496).

If these ideas dominate the question whether immunity should be granted to a foreign sovereign's property devoted to the public service, it logically follows that it is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation and devotion to such service that exempts it from judicial process. That in such use the owner of the instrumentality, through its servants, is permitted to remain in physical possession thereof, and, in consequence, may be

come personally liable for its agents' torts, is of no moment where, as in this case the ship and its entire equipment is under the absolute dominion of the sovereign.

The Florence H, 248 F. 1012, is said by analogy to support the libelant's contention in this behalf. The denial of immunity in that case was based solely upon the ground that by Congressional action (39 Stat. 730) the *Florence H*, though owned by the United States and devoted to national purposes, because of her employment as a merchant vessel, was made subject to all laws, regulations and liabilities governing merchant vessels. The ground of the decision negatives the pertinency of the citation.

Thus far I have considered this question as if no relations other than those arising from a state of peace and amity existed between this nation and the one suggesting the immunity. If, then, the consent of one sovereignty to waive jurisdiction over the public instrumentalities of another is implied, when the two live in amity, and in part because their mutual well being is promoted thereby, as announced in *The Exchange*, upon what theory is this immunity to be withdrawn from a sovereignty with whom this nation is actively engaged in prosecuting a war against a common enemy? The mutual benefit that accrues from such exemption in time of peace is at best but little in comparison with that which actually accrues in time of such a war.

The extraordinary conditions that environ the present suggestion of immunity, if they did not bring the instant case within the principle here deduced from the cases, would justify the announcing of one that did. However, as indicated, no such

judicial declaration is needed. The *Roseric* is well within such principle, and unless the British Embassy's *suggestion* is to be disregarded for the reasons now to be considered, must be held immune.

Libelant further contends that the suggestion of the British Government is not conclusive, and, if so intended, is not properly before the court, because not presented by the United States Attorney. As to the conclusiveness of the suggestion: In *The Exchange, supra*, the libelant answered the suggestion interposed on behalf of the French Government and sought to put it in issue. The Supreme Court, however, accepted the facts as declared in the suggestion. In *The Parliament Belge, supra*, the court, to a like contention, by Brett, *L. J.*, said:

"The ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the State. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of *The Exchange*. Whether the ship is a public ship used for national purposes seems to come within the same rule" (pp. 219, 220).

In the instant case none of the allegations of the suggestion have been put in issue. It is therefore, so far as this case is concerned, sufficient to say that if the suggestion has been properly presented, it is conclusive as to all its material statements of fact. To the same effect see *The Luigi, supra*, 495-6.

As to the source from which the suggestion came:

What is to prevent one sovereignty from appearing in the courts of another sovereignty? Or, stated more to the point, why should the court of one sovereignty refrain from receiving a suggestion as to its lack of jurisdiction because it comes solely from the representative of a foreign sovereignty? It is not merely a proper, but a commendable practice, for such suggestions to come through the Attorney General or one of his representatives, but is it to be disregarded unless it does so come? No case has been cited that holds as matter of law that such a suggestion will not be received from a foreign sovereign's official representative. True, in *The Luigi*, *supra*, upon an oral suggestion made in open court—seemingly as *amicus curiæ* for a foreign government—Judge Thompson said he “was of the opinion that inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government.”

In *The Florence H*, *supra*, Judge Learned Hand declined to receive the suggestion made on behalf of a foreign sovereign that to assume further jurisdiction might result in diplomatic embarrassment, unless such suggestion came through the diplomatic channels of this Government. But I do not understand that either Judge Thompson or Judge Hand denied the power of the Court to receive the suggestion through any other channels.

There may be good reasons in a given cause why a suggestion from a foreign sovereignty should not be entertained, save through the executive branch of the government, of which the Court is a part. To my mind, the sources from which such suggestion will be received is a matter of judicial discretion. Each case must be governed by its own cir-

cumstances, and *The Luigi* and *The Florence H.* I take to be instances where, in the exercise of judicial discretion, it was thought best not to receive the suggestion made on behalf of foreign governments unless they came through the executive department of our government, and not as determinations that no such suggestions would be received from any other source.

In the instant case there are no considerations influencing the judicial discretion to refuse to act upon the suggestion made directly to the court by the British Embassy. On the contrary, from what has already been said concerning our national interests as a co-belligerent with the British Government in the war pending at the time of the *Roseric's* seizure, they lead so obviously to an opposite determination that in the absence of an intimation from the executive branch of this government, that the public interests would be disserved by receiving such suggestion its rejection would not be justified.

The only remaining question is whether, in following the British Embassy's suggestion, the writ of arrest should be quashed or merely that the suit be stayed. While full immunity is to be accorded the British Government in the use of the *Roseric* while she is under its requisition, no good reason calls for the dismissal of the suit, a result which would follow the quashing of the writ.

A decree may be entered staying all proceedings to arrest or detain the *Roseric* so long as she continues in the service of the British Government.

A TRUE COPY

(Signed) GEORGE T. CRANMER,
Clerk.

(SEAL)

EX PARTE IN THE MATTER OF MUIR, MASTER
OF THE GLENEDEN.

PETITION FOR A WRIT OF PROHIBITION AND/OR FOR A WRIT
OF MANDAMUS.

No. 18, Original. Argued January 7, 1919.—Decided January 17, 1921.

1. Over a privately-owned ship, arrested in the District, and a libel for damages due to a collision alleged to have resulted from negligence of the owner's agents, the District Court has *prima facie* jurisdiction; and a mere allegation that the ship is an admiralty transport in the service of a foreign government is not enough to establish her immunity. P. 532.
2. A foreign government is entitled to appear in the District Court and propound its claim to a vessel in a libel suit upon the ground that the status of the vessel is public and places it beyond the jurisdiction; or its accredited representative may appear in its behalf; or, its claim, if recognized by our executive department, may be presented to the court by a suggestion made by or under authority of the

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Attorney General; but the public status of the ship, when in doubt, can not be determined upon a mere suggestion of private counsel appearing as *amici curiæ* in behalf of the embassy of the foreign government. P. 532.

3. This court, in its discretion, may decline to issue the writs of prohibition and mandamus to prevent exercise of jurisdiction by the District Court in an admiralty proceeding, where the jurisdiction is merely in doubt and the state of the case is such that the question may well be reconsidered by the District Court and on appeal. P. 534.

Rule discharged and petition dismissed.

THE case is stated in the opinion.

Mr. John M. Woolsey, with whom Mr. J. Parker Kirlin and Mr. D. M. Tibbets were on the brief, for petitioner:

The *Gleneden* as a British Admiralty transport in the service of the British Government was and is immune from arrest under process of the courts of the United States and should have been released by the United States District Court for the Eastern District of New York on the suggestion filed by counsel for the British Embassy as *amici curiæ*.

The method of proving the status of the *Gleneden* as a British public ship by a suggestion filed in behalf of the British Embassy by counsel appearing as *amici curiæ* was in accordance with the well established practice. *The Roseric*, 254 Fed. Rep. 154; *The Athanasios*, 228 Fed. Rep. 558; *The Maipo*, 252 Fed. Rep. 627; *The Adriatic*, 253 Fed. Rep. 489.

On the facts shown by the suggestion the ship was immune and the District Court should have released her forthwith on that representation. *The Exchange*, 7 Cranch, 116; *The Roseric*, *supra*; *The Broadmayne* [1916], Prob. 64; *The Messicano*, 32 T. L. R. 519; *The Erissos* (Lloyd's List, Oct. 24, 1917); *The Crimdon*, 35 T. L. R. 81.

It follows that the District Court exercised an unwar-

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ranted assumption of power in retaining the *Glenden* under process of arrest in order to force the giving of security. For, as the vessel was immune from process, there was no way in which the court could legally force an appearance by the owner of the vessel.

In our jurisprudence jurisdiction can only be obtained by personal service of process or by attachment or arrest of property. *Ex parte Indiana Transportation Co.*, 244 U. S. 456. A ship must be either a public ship or a private ship. *Tucker v. Alexandroff*, 183 U. S. 424, 446. If she was a public ship, which is conclusively proved by the suggestion, she was and is immune from process.

It has been held both here and in England that the question of the immunity of a vessel from arrest can be properly raised on an agreement such as that made here to give a bond in the event that the vessel is held not to be immune. *The Florence H.*, 248 Fed. Rep. 1012, 1014; *The Roseric*, *supra*; *The Crimdon*, *supra*.

The jurisdiction of this court to grant the relief asked is undoubted. There is not any other remedy. An appeal would not have been possible either to this court or to the Circuit Court of Appeals because the order requiring the giving of a bond was not a final order as against any party to the case.

Considerations of public policy and comity between the Government of the United States and the Government of Great Britain and the necessity for a speedy determination of the important questions here involved require the granting the relief prayed.

Mr. Homer L. Loomis, with whom *Mr. Joseph A. Barrett* and *Mr. J. Alvis Grace* were on the brief, for respondent.

Mr. Frederic R. Coudert and *Mr. Howard Thayer Kingsbury*, as amici curiæ, in behalf of the British Embassy:

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As an Admiralty transport, in the public service of the British Government, the *Gleneden* is immune from judicial process. *The Exchange*, 7 Cranch, 116; Moore's Int. Law Dig., vol. 2, p. 576; *Moítez v. The South Carolina*, Bee, 422, 17 Fed. Cas. No. 9,697; *Briggs v. Light-Boats*, 11 Allen, 157; *The Fidelity*, 9 Ben. 333; *affd.* 16 Blatchf. 569; *The John McCracken*, 145 Fed. Rep. 705; *The Thomas A. Scott*, 10 L. T. R. (N. S.) 726; *The Tartar*, Moore's Int. Law Dig., vol. 2, p. 577; *The Constitution*, L. R. 4 P. D. 39; *The Parlement Belge*, L. R. 5 P. D. 197, reversing L. R. 4 P. D. 129; *The Maipo*, 252 Fed. Rep. 627; *Young v. S. S. Scotia* [1903], A. C. 501; *The Broadmayne* [1916], Prob. 64; *The Messicano*, 32 T. L. R. 519; *The Erissos*, (Lloyd's List, Oct. 24, 1917); *The Crimdon*, 35 T. L. R. 81; *The Roseric*, 254 Fed. Rep. 154. The case of *The Attualita*, 238 Fed. Rep. 909, was distinguished in *The Roseric*, *supra*, on the ground that it was decided before this country became a co-belligerent.

This court has very recently held that the change in international relations caused by this nation becoming a co-belligerent instead of a neutral alters the relation of the court to cases having an international aspect. See *Watts, Watts & Co. v. Unione Austriaca*, 248 U. S. 9.

The Luigi, 230 Fed. Rep. 493, was also decided while this country was neutral and no official representations were made therein until after the vessel had been released upon a bond voluntarily given by her private owners.

There is another class of distinguishable cases, in which property belonging to a government has nevertheless been subjected to a lien for salvage or general average when such lien could be enforced without disturbing the possession and control of government representatives. See *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *Long v. The Tampico*, 16 Fed. Rep. 491; *United States v. Wilder*, 3 Sumner, 308; *The Johnson Lighterage Co. No. 24*, 231 Fed. Rep. 365.

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The test applied in these cases is whether the private lien can be asserted without interfering with the actual employment of the property in the public service. *The Fidelity*, *supra*.

Other cases, however, lay down the broader principle that property belonging to a sovereign Government is absolutely immune from local jurisdiction, irrespective of its immediate physical possession. *Hassard v. United States of Mexico*, 29 Misc. 511; 46 App. Div. 623; 173 N. Y. 645; *Vauvasseur v. Krupp*, L. R. 9 Ch. D. 351; and see Moore's Int. Law Digest, vol. 2, pp. 591-593.

It may be noted that this rule does not apply where the sovereign consents to be sued (*United States v. Morgan*, 99 Fed. Rep. 570), or to an uncondemned prize brought into a neutral port in violation of neutrality (*The Appam*, 243 U. S. 124).

Counsel also distinguished: *The Charkieh*, L. R. 8 Q. B. 197; L. R. 4 Adm. & Eccl. 59; *Oyster Police Steamers of Maryland*, 31 Fed. Rep. 763; *Workman v. New York City*, 179 U. S. 552; *The Florence H.*, 248 Fed. Rep. 1012; *The Prins Frederik*, 2 Dod. 451 (see *The Parlement Belge*, L. R. 5 P. D. 213; *De Haber v. Queen of Portugal*, 17 Q. B. 171); *The Swallow*, Swab. 30; *The Inflexible*, Swab. 32.

The criteria of immunity are government control and dedication to the public service. When government control intervenes, neither ownership nor technical possession fixes liability to process, mesne or final, upon the vessel or her owners. See *The Utopia* [1893], A. C. 492, 499.

In this case the Privy Council referred to *The Parlement Belge*, *supra*, as an accepted authority, and in *The Castle-gate* [1893], A. C. 38, 52, the House of Lords also cited it with approval.

The public importance of the question is not affected by the armistice.

The suggestion of immunity by counsel for the British Embassy is a proper method of procedure, and is conclu-

sive as to the official facts thus stated. *Dillon v. Strathairn S. S. Co.*, 248 U. S. 182.

This court has power to grant appropriate relief in this proceeding and such relief is necessary to meet the situation.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

On July 28, 1917, the *Gleneden*, a British steamship privately owned, and the *Giuseppe Verdi*, an Italian steamship similarly owned, came into collision in the Gulf of Lyons, both being seriously damaged. November 7, 1918, the British owner of the *Gleneden* commenced a suit *in rem* in admiralty against the *Giuseppe Verdi* in the District Court for the District of New Jersey to recover damages occasioned by the collision; and a few days later the Italian owner of the *Giuseppe Verdi* commenced a like suit against the *Gleneden* in the District Court for the Eastern District of New York. The libel in each suit attributed the collision entirely to negligence of servants and agents of the owner of the vessel libeled, it being alleged that she was in their charge at the time. When the suits were begun the vessels were within the waters of the United States and each was within the particular district where libeled.

The proceedings in the suit against the *Gleneden* are of immediate concern. After process issued and the vessel was arrested, private counsel for the British Embassy in Washington, appearing as *amici curiæ*, presented to the court a suggestion in writing to the effect that the process under which the vessel was arrested should be quashed and jurisdiction over her declined, because, as was alleged, "the said steamship is an Admiralty transport in the service of the British Government by virtue of a requisition from the Lords Commissioners of the

Admiralty, and is engaged in the business of the British Government, and under its exclusive direction and control and is under orders from the British Admiralty to sail from the Port of New York on or about November 25, 1918, to carry a cargo of wheat belonging and consigned to the British Government"; because the court "should not exercise jurisdiction over a vessel in the service of a co-belligerent foreign government," and because "the British courts have refused to exercise jurisdiction over vessels in government service, whether of the British Government or of allied governments, in the present war, and that by comity the courts of the United States should in like manner decline to exercise jurisdiction over vessels in the service of the British Government." An affidavit of the master of the vessel affirming the truth of much that was alleged accompanied the suggestion. The libellant, being cited to show cause why the suggestion should not be acceded to, responded by objecting that it was not presented through official channels of the United States and by denying that the facts were as alleged. A hearing on the suggestion was had in which the libellant and counsel for the British Embassy participated,—the latter only as *amici curiæ*,—and at which the owner of the *Glenseden* was represented informally, without an appearance. In the course of the hearing counsel for the libellant called on the others to submit proof in support of the allegations in the suggestion, particularly to produce the ship's articles and other instruments bearing on the suggested public status of the vessel, and to present the master for examination; but both the counsel for the British Embassy and the representative of the owner refused to do any of these things and insisted that the court was bound on the mere assertion of the claim of immunity to quash the process and release the vessel. The libellant produced the libel in the suit against the *Giuseppe Verdi*, depositions given in that suit by the

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master and other officers of the *Gleneden*, a certificate from the customs officers in New York showing the report and entry of the *Gleneden* on her arrival, and other evidence, all tending measurably to show that the vessel was operated by her owner under a charter party whereby the owner was to keep her properly manned, furnished and equipped, was to assume any liability arising from negligent navigation, and was to bear all loss, injury or damages arising from dangers of the sea, including collision. "On all the facts" thus put before it, the court found that "the *Gleneden* was owned by and was still in the beneficial possession of the Gleneden Steamship Co., Ltd., a private British corporation who, through its servants, was in the actual control of the steamer and of her navigation, but engaged in performing certain more or less public services for the British Crown under a contractual arrangement amounting to the usual or government form of time charter party." The court "decided accordingly that the *Gleneden* was not a public ship in the sense that she was either a government agency or entitled to immunity"; and the suggestion was overruled and an order was entered to the effect that the vessel would be released only on the giving of a bond by the owner securing the claim in litigation or a bond to the marshal conditioned for the return of the vessel when that could be done consistently with the ascertained needs of the British Government.

Afterwards, on November 29, 1918, the master, appearing specially for the interest of the owner and for the purpose of objecting to the arrest and detention of the vessel, interposed a special claim to the effect that the Gleneden Steamship Company, Limited, was the true and sole owner of the vessel and he as master was her true and lawful bailee; and also interposed therewith a peremptory exception to the jurisdiction of the court on the grounds taken in the suggestion on behalf of the British Embassy. This claim and exception concluded

with a prayer that the process be quashed and the vessel released. The exception was not set down for hearing and remains undisposed of. There was no appearance by either the owner or the master save as just stated; nor was there any appearance by the British Government or by any representative of that government other than through the suggestion which counsel for the Embassy in Washington presented as *amici curiæ*.

After filing the special claim and exception, the master applied to the Circuit Court of Appeals for the Second Circuit for writs of prohibition and mandamus preventing the District Court from exercising further jurisdiction and commanding it to undo what had been done; but the application was denied for reasons which need not be noticed now. 255 Fed. Rep. 24.

A few days later an arrangement was effected whereby an acceptable surety company undertook to enter into and file a stipulation for value in the usual form and in a sum to be named by the libellant, not exceeding \$450,000, unless on an intended application to this court for a writ of prohibition the vessel should be held immune from the process under which she was arrested and detained. Following that arrangement, on December 10, 1918, the District Court entered the following order:

"On the annexed agreement for security, and consent of the proctors for the libellant herein, and the record herein, it is

"ORDERED that in order to prevent further delay and expense, the steamship *Gleneden* be and she hereby is allowed to proceed on her voyage and leave the physical custody of the Marshal of the Eastern District of New York, provided, however, that this order does not and shall not be deemed to constitute any withdrawal or quashing of the writ of arrest; and it is

"FURTHER ORDERED that all proceedings herein be stayed and special claimant's or libellant's time to file any other

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or further papers herein be extended to and including the 23rd day of December, 1918, and in case application is made for a writ of prohibition to the Supreme Court on or before December 23rd, 1918, all proceedings herein be stayed and the time of the special claimant or of the libellant to file any other or further papers herein be extended until ten (10) days after the entry and service of an order or decree on the final decision of the United States Supreme Court on the said writ of prohibition."

The master thereupon asked leave of this court to file a petition for a writ of prohibition preventing the District Court from proceeding with the suit and from interfering with the *Gleneden* in any manner, and for a writ of mandamus directing that court to vacate the order made when the suggestion on behalf of the British Embassy was overruled and to enter an order releasing the vessel without requiring security,—the grounds advanced in the petition being essentially a repetition of those embodied in the suggestion of counsel for the British Embassy. The requested leave was given, a rule to show cause was issued, a return was made by the District Judge, and counsel have been heard. Whether on the case thus made either of the writs should be granted is the matter to be decided.

The principal question sought to be presented—whether the *Gleneden* is such a public vessel of the British Government as to be exempt from arrest in a civil suit *in rem* in admiralty in a court of the United States—is one of obvious delicacy and importance. No decision by this court up to this time can be said to answer it. The nearest approach is in the case of *The Exchange*, 7 Cranch, 116, where an armed ship of war, owned, manned and controlled by a foreign government at peace with the United States, was held to be so exempt. To apply the principle or doctrine of that decision to the *Gleneden* would be

taking a long step, and the present posture of this litigation is such that we find no occasion to consider whether there is proper warrant for taking it.

It is conceded that the *Gleneden* is not an armed ship of war, and that she is not owned by a foreign government but by a private corporation. In a sense she may be temporarily in the service and under the control of the British Government, but the nature and extent of that service and control are left in uncertainty by the proofs, although the facts evidently are susceptible of being definitely shown.

Prima facie the District Court had jurisdiction of the suit and the vessel, *The Belgenland*, 114 U. S. 355, 368-369, and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion. Merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough. These were matters which were not within the range of judicial notice and needed to be established in an appropriate way. They were not specially within the knowledge of the libellant, nor did it have any superior means of showing the real facts. Thus from every point of view it was incumbent on those who called the jurisdiction in question to produce whatever proof was needed to sustain their challenge.

As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. *The Sapphire*, 11 Wall. 164, 167; *The Santissima Trinidad*, 7 Wheat. 283, 353; *Colombia v. Cauca Co.*, 190 U. S. 524. Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. *The Anne*, 3 Wheat. 435, 445-446. And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the as-

served public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction. *The Cassius*, 2 Dall. 365; *The Exchange*, 7 Cranch, 116; s. c. 16 Fed. Cas. No. 8,786; *The Pizarro*, 19 Fed. Cas. No. 11,199; *The Constitution*, L. R. 4 P. D. 39; *The Parlement Belge*, L. R. 4 P. D. 129; s. c. L. R. 5 P. D. 197.

But none of these courses was followed. The suggestion on behalf of the British Embassy was presented by private counsel appearing as *amici curiæ*, and not through the usual official channels. This was a marked departure from what theretofore had been recognized as the correct practice (see cases last cited); and in our opinion the libellant's objection to it was well taken. The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision. See *United States v. Lee*, 106 U. S. 196, 209. Of course, the suggestion as made could not be given the consideration and weight claimed for it.

From all that has been said it is apparent that the status of the *Gleneden*, judged in the light of what was done and shown in the District Court, is at best doubtful and uncertain, both as matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, for it turns on the status of the vessel. The suit is still in the interlocutory stage. The court may take up again the question of its jurisdiction. If it does, the inquiry may proceed on other lines and the facts may be brought out more fully than before. In addition, the question

may be reëxamined in regular course on an appeal from the final decree.

The power of this court, under § 234 of the Judicial Code, to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty, to prevent an unlawful assumption or exercise of jurisdiction, is not debatable. But this power, like others, is to be exerted in accordance with principles which are well settled. In some instances, as where the absence of jurisdiction is plain, the writ goes as a matter of right. *Ex parte Phenix Insurance Co.*, 118 U. S. 610, 626; *Ex parte Indiana Transportation Co.*, 244 U. S. 456. In others, as where the existence or absence of jurisdiction is in doubt, the granting or refusal of the writ is discretionary. *In re Cooper*, 143 U. S. 472, 485; *In re New York & Porto Rico S. S. Co.*, 155 U. S. 523, 531; *In re Aliz*, 166 U. S. 136. And see *Ex parte Gordon*, 104 U. S. 515, 518-519; *The Charkieh*, L. R. 8 Q. B. 197.

Here the most that can be said against the District Court's jurisdiction is that it is in doubt; and in other respects the situation is such that we deem it a proper exercise of discretion to refuse the writ. Nothing need be added to show that the request for a writ of mandamus is on no better footing. *In re Morrison*, 147 U. S. 14, 26; *Ex parte Oklahoma*, 220 U. S. 191, 209; *Ex parte Roe*, 234 U. S. 70.

Rule discharged and petition dismissed.